No.

Supreme Court of the United States

STEPHEN J. WILLIAMS,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT APPELLATE COURT

PETITION FOR A WRIT OF CERTIORARI

Stephen J. Williams
Petitioner
12 September Road
Storrs, Connecticut 06268-2806
USA
+1-860-450-1288

QUESTIONS PRESENTED

Whether the federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to grant certification to appeal where that court had subsequently overturned the precedent relied upon by the Appellate Court?

Whether the federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to determine a motion to disqualify which alleged that the justices of that court had an actual bias in the proceeding?

TABLE OF CONTENTS

OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 2
STATEMENT OF THE CASE 2
A. Relevant proceedings in the Connecticut Superior Court 2
B. Relevant proceedings in the Connecticut Appellate Court 3
C. Relevant proceedings in the Connecticut Supreme Court 5
REASONS FOR GRANTING THE WRIT 11
A. The federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to grant certification to appeal where that court had subsequently overturned the precedent relied upon by the Appellate Court. 11
B. The federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to determine a motion to disqualify which alleged that the justices of that court had an actual bias in the proceeding. 13
CONCLUSION 17

APPENDIX 1
A. State v. Williams, 106 Conn.App. 323, 941 A.2d 985 (2008) 1
B. State v. Williams, 287 Conn. 908, 950 A.2d 1287 (2008) 8
C. Unpublished order of the Connecticut Supreme Court denying reconsideration (1 July 2008) 8
D. Unpublished order of the Connecticut Supreme Court permission to file "a letter bringing to the Court's attention a misstatement of the proceedings below, an incorrectly credited quotation and erronious or misleading citations contained in the State's opposition to Defendant's motion for reconsideration (1 July 2008) 9
E. Unpublished order of the Connecticut Supreme Court dismissing motion to disqualify judicial authority (17 July 2008) 10
F. Unpublished order of the Connecticut Supreme Court denying articulation of the Supreme Court's order dated July 17, 2008, dismissing the defendant's motion to disqualify judicial authority (5 September 2008) 11
G. U.S. Const. amend. XIV, § 1 12
H. 28 U.S.C. § 2106 12
I. Petitioner's Petition for Certification (18 April 2008) 13
J. State's Opposition to Defendant's Petition for Certification (28 April 2008) 33
K. Petitioner's Notice of Supplemental Authorities (2 May 2008) 45
L. Petitioner's Motion for Reconsideration (23 May 2008) 46

M. State's Opposition to Defendant's Motion for Reconsideration (4 June 2008) 52
N. Petitioner's Motion for Permission to File Letter Bringing to the Court's Attention a Misstatement of the Proceedings Below, an Incorrectly Credited Quotation and Erroneous or Misleading Citations Contained in the State's Opposition to Defendant's Motion for Reconsideration (13 June 2008) 61
O. Petitioner's Motion to Disqualify Judicial Authority (13 June 2008) 68
P. Petitioner's Motion for Articulation (22 July 2008) 83

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 16
Arizona v. Gant, 540 U.S. 963 (2003) 19, 22
Bracy v. Gramley, 520 U.S. 899 (1997) 15
Brecht v. Abrahamson, 507 U.S. 619 (1993) 16
Cislo v. Shelton, 240 Conn. 590, 692 A.2d 1255 (1997) ..... passim
Embalmers' Supply Co. v. Giannitti, 103 Conn.App. 20, 69, 929 A.2d 729 (2007) 23
Grannis v. Ordean, 234 U.S. 385 (1914) 3
Griffin v. Illinois, 351 U.S. 12 (1956) 7, 19
Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 14
In re Oliver, 333 U.S. 257 (1948) 3, 6, 8
In re Winship, 397 U.S. 358 (1970) 14
Klopfer v. North Carolina, 386 U.S. 213 (1967) 5
Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163 (1996) 15, 20, 23
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 17
Neder v. United States, 527 U.S. 1 (1999) 17
O'Brien v. Superior Court, 105 Conn.App. 774, 797-805, 939 A.2d. 1237 (2008) 23
Oregon State Penitentiary v. Hammer, 434 U.S. 945 (1977) 22
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 19
R.J. Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 130 (1986) 2
Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 16
Rose v. Clark, 478 U.S. 570 (1986) 16
Schweiker v. Hanson, 450 U.S. 785 (1981) 22
State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974) 8
State v. Herring, 209 Conn. 52, 547 A.2d 6 (1988) 13

State v. Smith, 289 Conn. 598, 960 A.2d 993 (2008) 14, 20, 21, 22
State v. Talton, 209 Conn. 133, 547 A.2d 543 (1988) 21
State v. Williams, 106 Conn.App. 323, 941 A.2d 985 (2008) ..... passim
State v. Williams, 287 Conn. 908, 950 A.2d 1287 (2008) 1, 6
State v. Winer, 286 Conn. 666, 945 A.2d 430 (2008) ..... passim
Tumey v. Ohio, 273 U.S. 510 (1927) 16
United States v. MacDonald, 456 U.S. 1 (1982) 5
Withrow v. Larkin, 421 U.S. 35 (1975) 16
Wolff v. McDonnell, 418 U.S. 539 (1974) 6
Youngblood v. West Virginia, 547 U.S. 867 (2006) 23

STATUTES

28 U.S.C. § 1257 1
28 U.S.C. § 2106 ..... 2, 20
Conn. General Statutes § 53-39a 19
Conn. General Statutes § 54-142a(c) 11, 18

RULES

Code of Judicial Conduct, Canon 3(a)(1) 10
Code of Judicial Conduct, Canon 3(a)(6) 10
Code of Judicial Conduct, Canon 4 10
Conn. Practice Book § 36-8 4
Conn. Practice Book § 36-3(a) 7

TREATISES

Black's Law Dictionary (8th ed. 2004) 10
P. T. Zarella & T. A. Bishop, "Judicial Independence at a Crossroads," 77 Conn. B.J. 21, 40 (2003) 9

R. Flamm, Judicial Disqualification, Second Edition 14, 15
R. Kay, "The Rule-Making Authority and Separation of Powers in Connecticut", 8 Conn. Law R.1 (1975) 8
T. Scheffery, "Small Changes Kill Big Court Reform Bill", 6/2/2008 Conn.L.Trib. 1 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 2, 6, 17

OPINIONS AND ORDERS BELOW

The Connecticut Superior Court denied Petitioner's motions to dismiss on 27 May 2005 and denied Petitioner's motion for return of bond on 9 June 2005. All trial court orders were without opinion. The Connecticut Appellate Court dismissed Petitioner's appeal in part and denied the appeal in part on 11 March 2008. *State v. Williams*, 106 Conn.App. 323, 941 A.2d 985 (2008). Petitioner's petition for certification to the Connecticut Supreme Court was denied on 13 May 2008. *State v. Williams*, 287 Conn. 908, 950 A.2d 1287 (2008). Finally, Petitioner's motion for reconsideration was denied, without opinion, by the state Supreme Court on 1 July 2008.

All opinions and orders are set out in the Appendix starting at App.1.

JURISDICTION

This Court has jurisdiction to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ... or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution". 28 U.S.C. § 1257(a).[1]

---

[1] This petition is properly directed to the Appellate Court. "The controlling principle is that the writ should be directed to the highest court of the state that actually ruled on the merits." Gressman, Geller, Shapiro, Bishop & Harnett, Supreme Court Practice, (9th ed., 2007), p. 439. See also *R.J.*

Petitioner seeks review of the Connecticut Supreme Court's refusal to certify the appeal despite subsequent rulings of that court invalidating the opinion in the Appellate Court. Petitioner also seeks review of the Connecticut Supreme Court's refusal to determine a motion to disqualify seeking the disqualification of justices of that court which, as demonstrated below, violated the Fourteenth Amendment to the United States Constitution.

This Petition is timely in that it was filed on 28 November 2008. Justice Ginsburg had ordered that the Petition may be filed on or before that date. (Application No. 08A242.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant portions of the U.S. Const. Amend. XIV and 28 U.S.C. § 2106 are set out in the Appendix starting at App.12.

STATEMENT OF THE CASE

A. Relevant proceedings in the Connecticut Superior Court

Defendant sought the dismissal of two charges which had previously been nolled by the prosecution and

---

Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 130, 138-9 (1986).

the return of bond which had been forfeited by the trial court.[2] All motions were summarily denied by the trial court.[3] App.2.

B. Relevant proceedings in the Connecticut Appellate Court

Petitioner appealed the trial court's determinations to the Appellate Court arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." *Williams*, 106 Conn.App. at 324, note 1, 941 A.2d at 986. One trial court judge had denied the motions to dismiss despite his having recused himself. Id., 106 Conn.App. at 325, note 2, 941 A.2d at 987. A second trial court judge had issued a series of rulings which, Petitioner argued, were legally indefensible and which culminated in Petitioner being summarily jailed through the misuse of the bail system.[4]

---

[2] Petitioner had not been present at the hearing on bond forfeiture, had received no notice that the trial court was considering forfeiture, had been provided with no opportunity to be heard on the issue and was not subsequently notified of the forfeiture. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence". *In re Oliver*, 333 U.S. 257, 273 (1948).

[3] Defendant's motions were denied without first affording the parties a hearing or any other opportunity to be heard. No statement of reasoning was provided by the trial court. "The fundamental requisite of due process of law is the opportunity to be heard". *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

[4] Subsequent events have demonstrated that the judge's rulings in this case were part of a larger pattern of questionable rulings. See testimony presented in opposition to Judge Patricia Swords' reconfirmation and pointed questioning by members of

The Appellate Court did not reach the question. Rather, it dismissed Petitioner's appeal as regards the dismissal of the charges as moot and affirmed the trial court's refusal to return the bond after applying an abuse of discretion standard. Id. at 328, 941 A.2d at 988. In determining that Petitioner's dismissal argument was moot, the Appellate Court relied on *Cislo v. Shelton*, 240 Conn. 590, 608, 692 A.2d 1255 (1997), for the principle that "nolles and dismissals ... carry the same legal and practical affect." Id. at 326, 941 A.2d at 987.[5] The Appellate Court applied the abuse of discretion standard despite that standard being inapplicable to a claim that the proceeding was structurally flawed due to judicial bias.

---

the Connecticut legislature. Connecticut Joint Committee on the Judiciary, 13 January 2009 transcript (http://www.cga.ct.gov/2009/JUDdata/chr/2009jud00113-R001000-CHR.htm); Connecticut Senate hearing, 14 January 2009 transcript (http://www.cga.ct.gov/2009/trn/S/2009STR00114-R00-TRN.htm) (visited 31 January 2009). Based upon these concerns, Judge Swords was only just confirmed by the Senate on a rare tie vote. Id.

[5] The Appellate Court's ruling directly conflicts with this Court's prohibition on the indefinite postponement of criminal proceedings. *Klopfer v. North Carolina*, 386 U.S. 213, 219-22 (1967). Connecticut's Practice Book § 36-8 permits a State's Attorney to undertake a misdemeanor prosecution at any time by summons without the involvement of a judicial authority. Because "[t]he prosecutor could activate the charges at any time and have the case restored for trial, 'without further order' of the court", the Sixth Amendment's fundamental right to a speedy trial is implicated. *United States v. MacDonald*, 456 U.S. 1, 9, note 8 (1982), citing *Klopfer*.

C. Relevant proceedings in the Connecticut Supreme Court

Petitioner sought certification to appeal to the Connecticut Supreme Court arguing that the Appellate Court erred when it determined that it lacked subject matter jurisdiction to consider Petitioner's claim that the charges should have been dismissed and that, in any event, the Appellate Court was required to consider Petitioner's claims of judicial bias. Petition for Certification, 18 April 2008, App. 13.[6]

---

[6] Petitioner also argued that he was denied due process in the Appellate Court when that court suspended its rules of practice to allow the State to admit a transcript into the appellate record after all briefs had been filed and after oral arguments had been had and therefore without affording Petitioner any opportunity to address that transcript. The State neglected to make a transcript on which it relied a part of the record on appeal. Upon being informed of this at oral argument, the State sought the late admission of the transcript. The Appellate Court ordered the suspension of its rules to permit the State to admit the transcript into the record. That Court subsequently relied on that transcripts in its decision despite Petitioner not having been afforded any opportunity to address the contents of that transcript. See *Williams*, 106 Conn.App. at 327, note 6, 941 A.2d. 988, and 106 Conn.App. at 328-29, 941 A.2d at 988-89 (Flynn, C.J., concurring). The Appellate Court violated Petitioner's Fourteenth Amendment protected due process right to notice and a meaningful opportunity to be heard. *Oliver*, supra. Petitioner also had a constitutionally protected right to a fair procedure. Certainly, a procedure that is modified retrospectively to the benefit of the prosecution and to the detriment of a criminal defendant cannot be termed a fair procedure. The retrospective modification of procedural rules amounts to arbitrary action and "[t]he touchstone of due process is protection of the individual against arbitrary action of government". *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Before the Connecticut Supreme Court could determine the Petition for Certification, that court issued an opinion in *State v. Winer*, 286 Conn. 666, 683, 945 A.2d 430, 440 (2008), which directly overruled *Cislo* on the central holding relied upon by the Appellate Court. Petitioner immediately brought the significance of *Winer* to the court's attention. Notice of Supplemental Authority, 2 May 2008, App. 45. Nonetheless, on 13 May 2008 the state Supreme Court denied Petitioner's petition for certification. *Williams*, 287 Conn. 908, 950 A.2d 1287.

Petitioner sought reconsideration of the denial by motion in which he argued that denial of certification to appeal under these circumstances amounted to a denial of Petitioner's Fourteenth Amendment protected right to procedural due process. Motion for Reconsideration, 23 May 2008, App. 46. Reconsideration was denied without opinion by the Connecticut Supreme Court on 1 July 2008. App. 8.[7]

---

[7] The State's Opposition to the Petitioner's Motion for Reconsideration misstated the Appellate Court opinion and contained an inaccurately attributed quotation and erroneous or misleading citations. Opposition, pp. 5-6, App. 52. The State's edits of the lower court's opinion were intended to create the impression that the Appellate Court had relied on cases other than *Cislo*. Petitioner sought to bring the Connecticut Supreme Court's attention to the prosecution's misleading edits. Motion for Permission to File Letter Bringing to the Court's Attention a Misstatement of the Proceedings Below, an Incorrectly Credited Quotation and Erroneous or Misleading Citations Contained in the State's Opposition to Defendant's Motion for Reconsideration, 13 June 2008, App. 61. The Connecticut Supreme Court denied permission to do so on 1 July 2008.

The Due Process Clause of the Fourteenth Amendment requires that where a state provides a right of appeal in a criminal matter, the state must afford the defendant a fair

Finally, while Petitioner's Motion for Reconsideration was pending, Petitioner submitted a motion to disqualify arguing that justices of the Connecticut Supreme Court had shown actual bias requiring their disqualification. Motion to Disqualify Judicial Authority, 13 June 2008, App. 68.[8] Petitioner's Petition for Certification implicated separation-of-powers issues which, if considered by the state Supreme Court, would likely result in a diminution of that court's political power. Id., pp. 2-4. Connecticut's highest court has successfully avoided revisiting this issue since that court claimed additional powers 35 years prior in *State v. Clemente*, 166 Conn. 501, 353 A.2d 723 (1974). Id., p. 2. See also R. Kay, "The Rule-Making Authority and Separation of Powers in Connecticut", 8 Conn. Law

---

procedure. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Connecticut's Practice Book § 66-3(a) denies the right of response to any argument raised in opposition to a motion in Connecticut's appellate courts. This procedure normally benefits the state in a criminal appeal. In the present case, Petitioner did not have notice that the State would misstate the proceedings below in their opposition at the time that he filed his motion for reconsideration and nor is there any possibility that he could have anticipated their doing so. Therefore, it was impossible for Defendant to have addressed this issue in his motion. Consequently, Petitioner was denied notice and any opportunity to be heard on this topic in Connecticut. See *Oliver*, supra.

[8] Petitioner's motion to disqualify was lodged with the Appellate Clerk on 13 June 2008. Petitioner's motion had been one page over-length and therefore had been lodged with a letter requesting that it be filed. Such requests are routinely approved by the Clerk based on standing instructions either the same day or, at the latest, the next day. Inexplicably, Petitioner's request was not approved until 24 days later. The motion was ultimately filed by the Clerk on 7 July 2008.

R.1 (1975). This personal interest in avoiding certification of the case necessarily gave the justices a direct interest in the controversy. Id., pp. 4-5.

Indeed, the issue had recently become so heated within state politics, with the co-chair of the legislative Joint Judiciary Committee threatening a constitutional amendment limiting the Connecticut Supreme Court's powers, that justices of that court resorted to making speeches extolling others to come to the defense of the judiciary. Just three days after denying Petitioner's petition for certification, Justice Zarella had given a speech to newly admitted Connecticut attorneys in which he had said:

> [A]s an attorney, who recognizes that the Code of Judicial Conduct requires that a judge abstain from public comment about a pending proceeding, you will do your part by publicly defending against unwarranted, unfair, or inappropriate criticism of the judiciary. Similarly legislative intrusions and other intrusions that threaten institutional independence should be opposed by attorneys when they deem that intrusion to be violative of the doctrine of separation of powers.

Prepared Remarks by Justice Peter T. Zarella, Bar Admission Ceremony, 16 May 2008.[9] Justice Zarella went on to say that:

---

[9] Speech available at http://www.jud.ct.gov/external/news/Speech/Zarella_051608.html (visited 31 January 2009). Justice Zarella had previously coauthored a law review article with Judge Bishop, who authored the case opinion in the Appellate Court, in which he warned of the "potential risks to the cherished independence of

> When you take the oath today to uphold the constitution of the United States and the state of Connecticut you, in effect, take on your first client - the judiciary. As officers of our legal system, you especially are responsible for defending the judiciary from unwarranted intrusions on its independence.

Id. It became clear that this was a coordinated effort on the part of the court when soon thereafter, Chief Justice Rogers made a very similar speech:

> As you know, we as judges cannot, under our Code of Judicial Ethics, comment about our cases. That is why it is so essential that the bar step up and speak up to make sure that the public understands the need for an independent judiciary that will apply the rule of law as opposed to making the popular or less controversial decision.

Remarks by Chief Justice Chase T. Rogers, CBA Bench/Bar Awards Luncheon, 9 June 2008.[10] See Motion to Disqualify, pp. 5-6, App. 68.

Petitioner's motion to disqualify also argued that by allowing themselves to become publicly embroiled in an ongoing political controversy which was likely to be before the court at some point in the future, the justices of the Connecticut Supreme Court had

---

the judiciary." P. T. Zarella & T. A. Bishop, "Judicial Independence at a Crossroads," 77 Conn. B.J. 21, 40 (2003).

[10] Speech available at http://www.jud.ct.gov/external/news/Speech/rogers_060908_cba.htm (visited 31 January 2009).

violated a number of Connecticut Canons of Judicial Conduct which require, for example, that "[a] judge abstain from public comment about a pending or impending proceeding", that he or she "be unswayed by partisan interests" and that he or she "cast no doubt on the judge's capacity to decide impartially any issue that may come before him or her". Canons 3(a)(6), 3(a)(1) and 4. See Motion to Disqualify, App. 68.

Finally, Petitioner argued in his motion that the justices of the Connecticut Supreme Court had taken concrete actions in this particular proceeding which demonstrated their actual bias. Id. Specifically, Petitioner argued that the court had refused to certify the appeal despite subsequent precedent requiring them to do so specifically because they wished to avoid considering any case which might diminish their power. Id.

With Petitioner's Motion to Disqualify pending, the Connecticut Supreme Court determined all remaining issues in the case. Then, on 17 July 2008, the Court *dismissed* Defendant's Motion to Disqualify.[11] App. 10. No reasoning was given for the failure to consider the motion.

---

[11] **dismiss**, *vb.* To send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved. Black's Law Dictionary (8th ed. 2004). Connecticut's appellate courts will ordinarily grant or deny a motion. But if, for example, a motion becomes moot, it is the normal practice of the appellate courts to dismiss the motion as moot rather than to deny it. The dismissal indicates that the motion was not considered on its merits.

Because of the court's irregular handling of Petitioner's Motion to Disqualify, Petitioner filed a Motion for Articulation highlighting the unusual procedural history and asking the court to articulate its reasons for dismissing the motion. Motion for Articulation, 22 July 2008, App. 83. The court denied the motion for articulation, once again without explanation. App. 11.

REASONS FOR GRANTING THE WRIT

A. The federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to grant certification to appeal where that court had subsequently overturned the precedent relied upon by the Appellate Court.

In a split decision, the majority in the Appellate Court relied on *Cislo v. Shelton*, 240 Conn. 590, 692 A.2d 1255 (1997). *Williams*, 106 Conn.App. at 326-7, 941 A.2d at 987. That court agreed with the State that "by operation of statute, the two charges that were nolled were dismissed thirteen months after the plea agreement." Id. at 326. Specifically, the lower court, quoting *Cislo*, held that "General Statutes § 54-142a(c) uses the term 'nolle' in a 'context that renders the provisions of § 54-142a(c) the functional equivalent of a dismissal'". Id. Because the Appellate Court believed that there was no functional distinction between a nolle and a dismissal, that court believed that there was no practical relief that could be afforded and consequently dismissed

Petitioner's claim as moot. Id. at 327, 941 A.2d at 988.[12]

One day after the State had filed its opposition to Petitioner's Petition for Certification, the Connecticut Supreme Court decided *State v. Winer*, 286 Conn. 666, 945 A.2d 430 (2008), in which it held that § 54-142a was "not [designed] to provide new substantive protections for defendants." *Winer* at 683, 945 A.2d at 440. *Winer* directly overruled *Cislo* on the central point relied upon by the Appellate Court. Defendant immediately filed a notice of supplemental authorities drawing the Court's attention to *Winer*. Notice of Supplemental Authorities, 2 May 2008, App. 45. Nonetheless, on 13 May, the Connecticut Supreme Court denied Defendant's Petition for Certification.[13]

---

[12] The minority opinion correctly concluded that *Cislo* was inapplicable and instead relied upon the Connecticut Supreme Court's holding that "[e]ven if the statute of limitations were to expire and the erasure statute becomes operative to deprive the state of access to records concerning [those] charges so as to render reinitiation of prosecution difficult or improbable, reinitiation of prosecution is not impossible." *Williams*, 106 Conn.App. at 329, 941 A.2d at 989 (Flynn, C.J., concurring) quoting *State v. Herring*, 209 Conn. 52, 57-58, 547 A.2d 6, 9 (1988).

[13] If there ever was a doubt that *Winer* invalidated the Appellate Court's holding in *Cislo*, that doubt evaporated when on 25 November 2008 the Connecticut Supreme Court released its opinion in *State v. Smith*, 289 Conn. 598, 960 A.2d 993 (2008), which discussed *Winer* and *Cislo* in detail. In that case, the Connecticut Supreme Court allowed a charge which had been nolled in 2001 to be resurrected and again prosecuted in 2005 despite the charge having been erased thirteen months after the nolle. Id. at 611, 960 A.2d at 1004. See the discussion of *Smith* contained in the Conclusion, pp. 18-20.

There is no debating that the federal Fourteenth Amendment, at the very least, requires "that our Government must proceed according to the 'law of the land'-that is, according to written constitutional and statutory provisions as interpreted by court decisions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting), quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting).[14]

The failure of the Connecticut Supreme Court to certify the appeal, where the Appellate Court's decision directly contravenes statutory provisions as subsequently interpreted by that court, denied Defendant minimum procedural due process as guaranteed by our federal constitution.[15]

B. The federal Fourteenth Amendment due process clause required the Connecticut Supreme Court to determine a motion to disqualify which alleged that the justices of that court had an actual bias in the proceeding.

---

[14] Petitioner brought his federal constitutional concerns to the attention of the Connecticut Supreme Court through a motion for reconsideration which was denied by that court. Motion for Reconsideration, 23 May 2008, App. 46; Order, App. 8.

[15] Indeed, even though this Court is not required to consider the interests of justice in determining a petition for writ of certiorari, it is still the practice of the Court to grant certiorari, vacate the decision of the lower court, and remand for determination in light of subsequent controlling precedents. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163 (1996). The Court does so in the interest of fairness. Id. at 168.

While most motions to disqualify simply argue that there is an appearance of bias, Petitioner's Motion to Disqualify Judicial Authority was unusual in that it alleged that justices of the Connecticut Supreme Court had an actual interest in the proceeding.

"[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no ... interest in the outcome of [the] particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-5 (1997) (internal citations and quotation marks omitted).

> [T]he Supreme Court has consistently held that a judge's failure to recuse will implicate the due process clause only when the right to disqualification arises from actual bias on the part of the challenged judge, or where the probability of such actual bias is too high to be constitutionally tolerable.

R. Flamm, Judicial Disqualification, Second Edition, 2007 Supplement, §2.5.2, pp. 16-17 (footnotes citing as authority *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-6 (2002)).

Trial by a judge who is not impartial is considered a structural defect. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). See also *Tumey v. Ohio*, 273 U.S. 510 (1927). Structural defect cases contain a

> "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, *supra*, at 310. Such errors "infect the entire trial

> process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose* [*v. Clark*, 478 U.S. 570, 577 (1986)]. Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence". Id., at 577-578.

Neder v. United States, 527 U.S. 1, 8-9 (1999).

> In order to reduce the risk of waste inherent in having a challenged judge issue or take other actions that are potential nullities it is generally agreed that, when a judge is confronted with a motion seeking his disqualification, he should resolve that motion immediately, before making other rulings in the case.

R. Flamm, Judicial Disqualification, Second Edition, 2007, §17.1, p. 486 (see also cases cited in omitted footnotes). For an illustration of the potential consequences when a judge does not promptly consider his recusal, see *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 (1988).

In the present case, there can be no doubt that Petitioner promptly sought disqualification. The Connecticut Supreme Court had denied Petitioner's petition for certification on 13 May 2008. Justice Zarella's speech was given three days later. Chief Justice Chase's speech was given just four days prior to Petitioner submitting his motion to disqualify on 13 June. During the intervening period, events were

still unfolding within the state legislature. See, for example, T. Scheffery, "Small Changes Kill Big Court Reform Bill", 6/2/2008 Conn.L.Trib. 1. Nor had the matter yet become final in the Connecticut Supreme Court as motions in this case remained pending before that court including a motion for reconsideration.

Yet the Connecticut Supreme Court did not promptly determine Petitioner's motion to disqualify. Rather, 18 days later, on 1 July 2008, the court denied all pending substantive motions in the case and then, finally, 16 days after that, the court *dismissed* Petitioner's motion to disqualify. Order, App. 10.

Because a dismissal of a motion to disqualify is inexplicable, Petitioner immediately filed a Motion for Articulation asking that the Connecticut Supreme Court "articulat[e] its order ... dismissing Defendant's Motion to Disqualify". Motion for Articulation, 22 July 2008, App. 83. The court denied that motion, again without explanation, on 5 September. Order, App. 11.

It is the most fundamental principle of procedural due process that a court must determine a motion which seeks disqualification rather than to simply ignore that motion, decide the substantive issues in the case from which disqualification had been sought, and then, finally, dismiss the motion to disqualify undecided. This is especially true where the motion to disqualify claimed a structural defect which, if found to exist, necessarily would invalidate the entire proceeding from beginning to end.

The Due Process Clause of the Fourteenth Amendment requires that where a state provides a right of appeal in a criminal matter, the state must at least afford the defendant a fair procedure. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The state clearly denied Petitioner a fair procedure. Furthermore, principles of comity are predicated upon the state courts being willing to provide an appropriate forum to address federal claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999). Here, Petitioner was denied that forum.[16]

CONCLUSION

A summary reconsideration order is appropriate in this matter. See Sup. Ct. R. 16.1. Petitioner therefore asks that this Court grant certiorari, vacate the order denying certification by the Connecticut Supreme Court and remand to the state courts for consideration ("GVR").

The *Winer* opinion was released subsequent to the decision of the Appellate Court and invalidated the central legal basis of that decision. This is therefore an appropriate occasion for a GVR. *Arizona v. Gant*, 540 U.S. 963 (2003). Furthermore, this basis for a GVR is in line with the narrower standard

---

[16] Because the Connecticut Supreme Court denied certification and dismissed Petitioner's Motion to Disqualify, Petitioner was afforded limited opportunity to raise his federal constitutional concerns in that court. Petitioner did, however, attempt to bring his concerns to that court's attention through his Motion to Disqualify and Motion for Articulation. Motion to Disqualify Judicial Authority, 13 June 2008, p. 4, App. 68; Motion for Articulation, 22 July 2008, p. 3, App. 83.

announced by Justice Scalia in *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 191-92 (1996) (Scalia, J., dissenting) ("where an intervening factor has arisen that has a legal bearing upon the decision").

Indeed, the Connecticut Supreme Court recently released *State v. Smith*, 289 Conn. 598, 960 A.2d 993 (2008), which confirmed and expanded on that court's holding in *Winer*. In *Smith*, the defendant had argued that:

> [The Connecticut Supreme Court's] holding in *Cislo v. Shelton*, 240 Conn. 590, 692 A.2d 1255 (1997), required that the court construe the entry of the nolle prosequi as functionally equivalent to a dismissal of all charges, thereby precluding the refiling of charges arising from the same factual scenario several years later.

Smith at 605, 960 A.2d at 1001. The Connecticut Supreme Court squarely rejected Smith's argument concluding that:

> With respect to the defendant's claim that the nolle converted into a dismissal after thirteen months had elapsed, thus barring future prosecution, the defendant erroneously equates the term "dismissal" with "dismissal with prejudice." In *Cislo v. Shelton*, supra, 240 Conn. at 599, 692 A.2d 1255, this court held that "the entry of a nolle plus the passage of thirteen months, which results in the automatic erasure of relevant records under § 54-142a(c), constitutes a dismissal for the

> purposes of § 53-39a." After reviewing the legislative history surrounding the enactment of § 53-39a, however, the court noted that a nolle was functionally equivalent to a dismissal *without prejudice*. Id., at 609, 692 A.2d 1255; see also *State v. Talton*, 209 Conn. 133, 141, 547 A.2d 543 (1988). Such a dismissal does not preclude the state from filing charges – even the same ones – at a later time, provided that the statute of limitations has not run. *State v. Talton*, supra, at 141-42, 547 A.2d 543 (noting that if state cannot make appropriate representation to allow nolle to enter, charges are dismissed and state may not reprosecute on same offense; but if state makes necessary representation and nolle enters, state is not precluded from refiling charges).

Smith at 611-12, 960 A.2d at 1005-06 (Emphasis in original.) The central holding of the Appellate Court in the present case was that:

> Our Supreme Court has held that although nolles and dismissals have technically different meanings, they carry the same legal and practical effect. *Cislo v. Shelton*, 240 Conn. 590, 608, 692 A.2d 1255 (1997).

Williams, 106 Conn.App. at 326, 941 A.2d at 987. The Appellate Court holding is irreconcilable with *Smith*. Indeed, *Smith* provides an example of exactly the sort of re-prosecution after nolle and erasure that the Appellate Court claimed was not possible. See *Smith* at 611, 960 A.2d at 1004. Clearly, GVR is now also appropriate to afford the Connecticut courts an

opportunity to consider Petitioner's appeal based upon this most recent opinion. *Gant*, supra.

Reversal on the merits is also appropriate based upon the refusal of the justices of the Connecticut Supreme Court to consider their own disqualification. See 28 U.S.C. § 2106. It simply is not debatable that a court may avoid determining a motion to disqualify alleging that the justices have an actual interest in the outcome of the controversy by ignoring the motion and then, ultimately, dismissing it. This is a situation where "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hanson*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Therefore, Reversal on the merits on this point is appropriate.

Having avoided consideration of the disqualification issue, this is obviously not the situation where the lower court has provided a "carefully reasoned decision". *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1977) (Stevens, J. dissenting). Indeed, the lower court pointedly refused to provide any reasons for its order dismissing Petitioner's Motion to Disqualify. See Petitioner's Motion for Articulation, 22 July 2008, App. 83. Under these circumstances, a GVR is also appropriate to afford the Connecticut court an opportunity to address Petitioner's constitutional claims. See, for example, *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (GVR to afford the state supreme court an opportunity to express its views on the defendant's constitutional claims).

Finally, as regards the equities presented in this case, those equities clearly favor Petitioner where, as is recounted throughout this Petition, the Connecticut courts have taken every opportunity available to them to deny Petitioner a procedurally fair process where he might raise his federal constitutional claims. *Lawrence*, 516 U.S. at 167-68.[17]

---

[17] Indeed, the Connecticut courts' policy of chilling claims which threaten the standing of the judiciary is made plain by recent unusually frank comments by the judge who penned the Appellate Court opinion in this case that "mere claims of judicial misconduct, unmoored to the constitutional rights of a litigant and unclaimed for plain error review, should not find a hospitable response on direct appeal." *Embalmers' Supply Co. v. Giannitti*, 103 Conn.App. 20, 69, 929 A.2d 729, 758, *cert. denied*, 284 Conn. 931, 934 A.2d 246 (2007) (Bishop, J., concurring). See also *O'Brien v. Superior Court*, 105 Conn.App. 774, 797-805, 939 A.2d. 1237-1242, *cert. denied*, 287 Conn. 901, 947 A.2d 342 (2008) (DiPentima, J., concurring in part, dissenting in part) (criticizing attorney for requesting an investigation). Judge DiPentima joined Judge Bishop's majority opinion.

Respectfully submitted,

Stephen J. Williams
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
+1-860-450-1288

APPENDIX

A. State v. Williams, 106 Conn.App. 323, 941 A.2d 985 (2008)

Appellate Court of Connecticut.
STATE of Connecticut
v.
Stephen J. WILLIAMS.
No. 26901.

Argued Sept. 24, 2007.
Decided March 11, 2008.

**986 Stephen J. Williams, pro se, the appellant.
Rita M. Shair, senior assistant state's attorney, with whom were James E. Thomas, former state's attorney, and, on the brief, Adam B. Scott, supervisory assistant state's attorney, for the appellee (state).

FLYNN, C.J., and BISHOP and DiPENTIMA, Js.

BISHOP, J.
*324 The defendant, Stephen J. Williams, appeals from the judgments of the trial court denying his motions to dismiss and his motion for return of bond.[1] We dismiss the defendant's first claim as moot. *325 We affirm the judgment of the trial court as to his second claim.

---

[1] The defendant also asserts that a pervasive pattern of judicial misconduct denied him the opportunity for a fair and impartial hearing. The defendant raises this claim for the first time on appeal, and we, therefore, decline to address it. See *Embalmers' Supply Co. v. Giannitti*, 103 Conn.App. 20, 61, 929 A.2d 729,cert. denied, 284 Conn. 931, 934 A.2d 246 (2007).

On April 4, 2005, in accordance with a plea agreement, the defendant was granted accelerated rehabilitation for a charge of reckless driving in violation of General Statutes § 14-222. By the terms of the agreement, the defendant was given thirty days probation, which was completed on May 4, 2005, and on that date this charge was dismissed. Additionally, as part of the plea agreement, the state entered nolles on the remaining charges of failure to appear and driving while under suspension.

On May 26, 2005, the defendant filed motions to dismiss the charges for driving while under suspension and failure to appear, asserting that, in accordance with the **987 plea agreement, they, too, should have been dismissed on May 4, 2005, when the reckless driving charge was dismissed. On May 27, 2005, the court denied both motions.[2] On June 9, 2005, the defendant filed a second motion for return of bond for the $250 cash bond that he had posted himself. The court denied the motion. This appeal followed.

Because mootness implicates this court's subject matter jurisdiction, we begin by addressing the state's claim in this regard. "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the

---

[2] The motions to dismiss were denied by Judge Norko after he had recused himself in this matter. Because we dismiss this claim as moot, we do not reach the issue raised by the defendant on appeal regarding the fact that Judge Norko participated in this matter after recusing himself.

granting of actual relief or from the determination of which no practical relief can follow.... An actual controversy must exist not only at the ***326** time the appeal is taken, but also throughout the pendency of the appeal.... When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Lucas v. Deutsche Bank National Trust Co.*, 103 Conn.App. 762, 766, 931 A.2d 378 (2007).[3]

The basis of the state's mootness claim is its assertion that, by operation of statute, the two charges that were nolled were dismissed thirteen months after the plea agreement. The state argues, as well, that the statute of limitations in this case has run, and, as a result, the defendant is in exactly the same position he would have been in had the court granted his motions to dismiss. We agree with the state.

Our Supreme Court has held that although nolles and dismissals have technically different meanings, they carry the same legal and practical effect. *Cislo v. Shelton*, 240 Conn. 590, 608, 692 A.2d 1255 (1997). The entry of a nolle followed by the lapse of the statutory period of thirteen months results in the mandatory erasure of the pertinent records pursuant to General Statutes § 54-142a(c). General Statutes § 54-142a(c) uses the term "nolle" in a "context that renders the provisions of § 54-142a(c) the functional equivalent of a dismissal.... This construction of § 54-

---

[3] This court has also dismissed portions of appeals, versus entire cases, as moot. See *Merry-Go-Round Enterprises, Inc. v. Molnar*, 10 Conn.App. 160, 162, 521 A.2d 1065 (1987).

142a(c) is also consistent with much of the general jurisprudence of nolles and dismissals. Although they have some doctrinal and procedural differences ... in some legal respects they are treated as fungible. See, e.g., *State v. Gaston*, [198 Conn. 435, 440, 503 A.2d 594 (1986)] (nolle and dismissal treated same for purposes of speedy trial analysis); *327 *See v. Gosselin*, 133 Conn. 158, 160-61, 48 A.2d 560 (1946) (nolle and dismissal treated same for purposes of subsequent action for malicious prosecution)." (Citation omitted.) *Cislo v. Shelton*, supra, at 608-609, 692 A.2d 1255.

Here, because the nolles were entered on April 4, 2005, and more than thirteen months have elapsed, the erasure statute has expunged any record of the defendant's arrest. Additionally, the statute of limitations has run, thereby precluding the state from reprosecuting the defendant.[4] The same result would have been **988 obtained had the court dismissed the charges.[5] Accordingly, because there is

---

[4] Although we acknowledge that the statute of limitations is an affirmative defense, not a jurisdictional bar to prosecution; *State v. Herring*, 209 Conn. 52, 58, 547 A.2d 6 (1988); under the circumstances of this particular case, in which the state has acknowledged that the statute of limitations has run and it is, consequently, barred from reprosecuting the defendant, the nolle is the functional equivalent of a dismissal.

[5] In his reply brief, the defendant claims that a dismissal would allow him to pursue a claim in the federal courts for unlawful arrest or malicious prosecution, whereas a nolle does not. Because this claim is raised for the first time in his reply brief, we decline to address it. See *Grimm v. Grimm*, 276 Conn. 377, 393-94 n. 19, 886 A.2d 391 (2005) ("[c]laims ... are unreviewable when raised for the first time in a reply brief"), cert. denied, 547 U.S. 1148, 126 S.Ct. 2296, 164 L.Ed.2d 815 (2006).

no practical relief that we can afford the defendant, his claim that the court improperly denied his motions to dismiss is moot.[6]

The defendant's second claim is that his $250 cash bond posted in connection with the information charging him with reckless driving should have been returned to him. "The determination of an appropriate pretrial bond is a matter within the sound discretion of the trial court.... An appeal therefrom will be sustained only in the event that it appears that the trial court has *328 exercised its discretion in so unreasonable a manner as to constitute an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State v. McDowell*, 241 Conn. 413, 415, 696 A.2d 977 (1997).

The following additional facts are relevant to the defendant's claim. The defendant failed to appear before the court twice. On the second occasion, the court indicated that the defendant had another failure to appear in another court, that he had failed to appear for trial and that there was a jury in the building for selection for his trial. In denying his motion for return of bond, the court did not make a finding that the defendant's failure to appear was not willful, and the defendant did not seek an articulation as to the reasoning of the court's decision. In light of the foregoing, we cannot conclude

---

[6] Even if we were to conclude that the defendant's claim is not moot, because the defendant did not object to the nolles at the time they were entered, and, in fact, the nolles were part of a plea bargain between the defendant and the state, he has waived any claim that the charges should have been dismissed. See General Statutes § 54-56b.

that the court abused its discretion in denying the defendant's motion for return of bond.

The appeal is dismissed as to the denial of the defendant's motions to dismiss and the judgment in the first case is affirmed.

In this opinion DiPENTIMA, J., concurred

FLYNN, C.J., concurring.

I agree with the majority that the defendant, Stephen J. Williams, cannot prevail on his claim that he was entitled to a dismissal pursuant to General Statutes § 54-56b. I reach that conclusion, however, on grounds different from those relied on by the majority. The record is clear that the defendant made a plea agreement to accept a nolle on the remaining charges, and he did not object to the nolle "at the time it [was] offered" as is required under Practice Book § 39-30.[1] *329 He demanded **989 neither a dismissal nor an immediate trial. Rather, he accepted the plea agreement on the record and specifically acknowledged that these were the terms of the plea agreement. He, therefore, has waived any right to a dismissal of the charges under § 54-56b.

---

[1] Practice Book § 39-30 provides: "Where a prosecution is initiated by complaint or information, the defendant may object to the entering of a nolle prosequi *at the time it is offered* by the prosecuting authority and may demand either a trial or a dismissal, except when a nolle prosequi is entered upon a representation to the judicial authority by the prosecuting authority that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary." (Emphasis added.)

I write separately because our Supreme Court determined in *Cislo v. Shelton*, 240 Conn. 590, 598, 692 A.2d 1255 (1997), only that a nolle was the equivalent of a dismissal for purposes of triggering provisions of an indemnity statute, General Statutes § 53-39a, requiring that police officers be reimbursed for their attorney's fees in certain circumstances where criminal charges against them are dismissed or the officers are found not guilty. The case did not involve a defendant's constitutional right against double jeopardy or his right under § 54-56b to demand a trial or a dismissal, and, therefore, I would not rely on *Cislo* as persuasive precedent for the present case.

Our Supreme Court made it plain in *State v. Herring*, 209 Conn. 52, 57-58, 547 A.2d 6 (1988), that "[e]ven if the statute of limitations as to ... misdemeanors were to expire and the erasure statute become operative to deprive the state of access to records concerning [those] charges so as to render reinitiation of prosecution difficult or improbable, reinitiation of prosecution is not impossible." The court went on to explain that "[t]he statute of limitations is an affirmative defense, not a jurisdictional bar to prosecution ... and the erasure statute does not foreclose the utilization of the personal and independent observation of witnesses to initiate a new prosecution." (Citation omitted.) Id., at 58, 547 A.2d 6.

The court reasoned that "the effect of the entry of the nolles was only to terminate this particular prosecution *330 without an acquittal and without placing the defendant in jeopardy, [and, therefore] he

remains vulnerable to reinstatement of a prosecution against him." Id., at 57, 547 A.2d 6. The court did not hold the issue moot, even where the statute of limitations had run on the underlying misdemeanor charges and the erasure statute had become effective. Accordingly, I do not agree with the majority that a nolle and a dismissal carry "the same legal and practical effect."

B. State v. Williams, 287 Conn. 908, 950 A.2d 1287 (2008)

Supreme Court of Connecticut.
STATE of Connecticut
v.
Stephen J. WILLIAMS.

Decided May 13, 2008.

Stephen J. Williams, pro se, in support of the petition.
Rita M. Shair, senior assistant state's attorney, in opposition.

The defendant's petition for certification for appeal from the Appellate Court, 106 Conn.App. 323, 941 A.2d 985 (2008), is denied.

C. Unpublished order of the Connecticut Supreme Court denying reconsideration (1 July 2008)

SUPREME COURT
STATE OF CONNECTICUT

No. A.C. 26901

State of Connecticut

v.

: July 1, 2008

Stephen J. Williams

ORDER

The motion of the defendant, filed May 23, 2008, for reconsideration of the order denying the petition for certification, having been presented to the court, it is hereby ordered **denied**.

By the Court,
/s/
Paul S. Hartan
Deputy Chief Clerk

D. Unpublished order of the Connecticut Supreme Court permission to file "a letter bringing to the Court's attention a misstatement of the proceedings below, an incorrectly credited quotation and erronious or misleading citations contained in the State's opposition to Defendant's motion for reconsideration (1 July 2008)

SUPREME COURT
STATE OF CONNECTICUT

No. A.C. 26901

State of Connecticut

v.

: July 1, 2008

Stephen J. Williams

ORDER

The motion of the defendant, filed June 13, 2008, for permission to file "a letter bringing to the Court's attention a misstatement of the proceedings below, an incorrectly credited quotation and erronious or misl· ding citations contained in the State's opposition to Defendant's motion for reconsideration," having been presented to the court, it is hereby ordered **denied**.

By the Court,
/s/
Paul S. Hartan
Deputy Chief Clerk

E. Unpublished order of the Connecticut Supreme Court dismissing motion to disqualify judicial authority (17 July 2008)

SUPREME COURT
STATE OF CONNECTICUT

No. A.C. 26901

State of Connecticut

v.

: July 17, 2008

Stephen J. Williams

ORDER

The motion of the defendant, filed July 7, 2008, to disqualify judicial authority having been presented to the court, it is hereby ordered dismissed.

By the Court,
/s/
Paul S. Hartan
Deputy Chief Clerk

F. Unpublished order of the Connecticut Supreme Court denying articulation of the Supreme Court's order dated July 17, 2008, dismissing the defendant's motion to disqualify judicial authority (5 September 2008)

SUPREME COURT
STATE OF CONNECTICUT

No. A.C. 26901

State of Connecticut

v.

: September 5, 2008

Stephen J. Williams

ORDER

The motion of the defendant, filed July 22, 2008, for articulation of the Supreme Court's order dated July

17, 2008, dismissing the defendant's motion to disqualify judicial authority, having been presented to the court, it is hereby ordered **denied.**

By the Court,
/s/
Michele T. Angers
Chief Clerk

G. U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

H. 28 U.S.C. § 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

I. Petitioner's Petition for Certification (18 April 2008)

Docket Nos. AC 26901, MV04-392089 and MV05-394080	Connecticut Supreme Court
State of Connecticut vs. Stephen J. Williams	18 April 2008

PETITION FOR CERTIFICATION

Questions Presented for Review

Defendant sough the dismissal of charges which had previously been nolled by the prosecution and the return of bond which had previously been forfeited by the trial court. In relation to those claims, Defendant asks that this Court consider:

1. Whether the Appellate Court erred in determined that it lacked subject matter jurisdiction to consider Defendant's motions to dismiss because "the erasure statute has expunged any record of defendant's arrest" and "the statute of limitations has run" thereby resulting in Defendant's claim becoming moot?

2. Presuming this Court concludes that the Appellate Court had subject matter jurisdiction to consider Defendant's motions to dismiss, and in any event in relation to the return of bond issue, whether the Appellate Court was required to consider Defendant's claim "that a pervasive pattern of

judicial misconduct denied him the opportunity for a fair and impartial hearing"?

3. Whether the Appellate Court denied Defendant procedural due process when it suspended its rules of practice to allow the State to admit a transcript into the appellate record after all briefs had been filed and after oral argument had been had?

Basis for Certification

This case meets four of the five criteria for certification as contained in P.B. § 84-2.

The Appellate Court was divided in its disposition with Judge Bishop, joined by Judge DiPentima, dismissing the appeal as to the denial of the motions to dismiss and affirming the judgment as to the return of bond. Chief Judge Flynn filed a concurring opinion making clear that he would affirm the judgment as to the motions to dismiss.[1] See P.B. § 84-2(5).

---

[1] Judge Flynn's opinion is termed a "concurrence". "A concurring opinion serves the special purpose of presenting an additional rationale or different theory in support of the majority's conclusion." Kinsey v. Pacific Employers Ins. Co., 277 Conn. 398, 420 (2006) (Zarrela, J., concurring), When it was pointed out to Judge Flynn that his opinion was not really a concurrence, he edited the opinion to remove the second half of his second sentence which had originally concluded with "and I would affirm the judgment of conviction rather than dismiss the appeal as moot." Thus, the opinion now contains no statement as to the disposition. But the opinion as a whole makes clear that Chief Judge is not concurring in the majority's disposition dismissing a portion of the appeal. Therefore, the opinion should more correctly be termed a dissent.

As noted by Judge Flynn, the majority's opinion is in direct conflict with State v. Herring, 209 Conn. 52 (1988). For different reasons, the majority's holding is also in conflict with Clerk v. Freedom of Information Com'n, 278 Conn. 28 (2006); State v. Hines, 243 Conn. 796 (1998) and In re Flanagan, 240 Conn. 157 (1997). The Appellate Court decision similarly conflicts with Klopfer v. North Carolina, 386 U.S. 213 (1967) and Tumey v. Ohio, 273 U.S. 510 (1927). See P.B. § 84-2(1).

While this Court has considered whether a nolle on a felony charge comports with Kolpfer, this Court has never considered whether a nolle on a misdemeanor charge, which, unlike a felony, can be reactivated without the involvement of a judicial authority, also comports with Kolpfer. Nor has this Court ever considered whether the erasure statute, C.G.S. § 54-142a, comports with the separation of powers doctrine. See P.B. 84-2(1).

This Court has said that "an accusation of prejudice against a judge 'strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary'". Cameron v. Cameron, 187 Conn. 163, 168 (1982). Clearly, therefore, this appeal, which involves claims of judicial misconduct, raises "a question of great public importance". Indeed, the real issue underlying this appeal is whether, post-Sullivan, our judiciary can be relied upon to police itself and therefore, whether the high degree of autonomy which our judiciary currently enjoys through the separation of powers doctrine is sustainable. This is the issue which was really at the heart of Sullivan v. McDonald, 281 Conn. 122 (2007). See P.B. § 84-2(4).

Finally, this Court's supervision is necessary to correct the Appellate Court's "depart[ure] from the accepted and usual course of judicial proceedings" by determining Defendant's appeal on a record which Defendant had neither timely notice of nor a meaningful opportunity to address. P.B. § 84-2(3). Furthermore, a petition for certification differs from a petition for writ of certiorari in that this Court must also consider "the interests of justice to the particular litigants" which is not normally a certiorari consideration. State v. Cullum, 149 Conn. 728, 730 (1961). For this additional reason, this Court must consider Defendant's argument that he was denied procedural due process in the Appellate Court. Failure to do so would leave him no avenue to raise this argument and therefore conflict with cases such as Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930), and Lindsey v. Normet, 405 U.S. 56 (1972), which hold that the due process and equal protection clauses of the Fourteenth Amendment mandate that due process be afforded in at least one tribunal.

From a certiorari perspective, this case represents a good vehicle as the facts relevant to the questions presented are straightforward and the uniqueness of this case makes it unlikely that another vehicle will soon present itself that will afford this Court an opportunity to address these issues. All arguments were preserved in the Appellate Court.

Summary of the Case

Defendant sough the dismissal of two charges which had previously been nolled by the prosecution and

the return of bond which had previously been forfeited by the trial court. All motions were denied by the trial court.

Defendant appealed these determinations to the Appellate Court arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." The State countered that the dismissal issue was now moot, that Defendant had failed to properly preserve the issues in the trial court, that Defendant had failed to present an adequate record on appeal and that, as a matter of law, purely courtroom conduct can never amount to judicial misconduct. The Appellate Court's disposition of the appeal is addressed below.

Argument

A nolle and a dismissal do not carry the same legal and practical effect and therefore the Appellate Court should not have dismissed Defendant's claim as moot.

Judges Bishop and DiPentima agreed with the State that "the two charges that were nolled were dismissed thirteen months after the plea agreement". State v. Williams 106 Conn.App. 323, 326 (2008). Specifically, the majority, citing Cislo, "held that although nolles and dismissals have technically different meanings, they carry the same legal and practical effect." Judge Flynn, citing Herring, reached the opposite conclusion. Id. at 330.

The majority also held that "the statute of limitations has run, thereby precluding the state from reprosecuting the defendant." Id. at 327.

Conversely, Judge Flynn, again citing Herring, argued that "[t]he statute of limitations is an affirmative defense, not a jurisdictional bar to prosecution". Id. at 329.[2]

There are significant differences between a nolle and a dismissal.

> A dismissal is an act of the court, whereas a nolle is, except when limited by statute or rule of practice; see, e.g., General Statutes § 54-56b and Practice Book § [29-30]; a unilateral act by a prosecutor, which ends the "pending proceedings without an acquittal and without placing the defendant in jeopardy."

State v. Lloyd, 185 Conn. 199, 201 (1981). A dismissal results in the discharge of the defendant. P.B. § 39-32. A nolle terminates a prosecution but does not prevent the prosecuting authority from subsequently reinitiating the prosecution. P.B. § 39-31.

---

[2] The majority addressed Herring only in a footnote. While acknowledging that the statute of limitations is an affirmative defense and not a jurisdictional bar to prosecution, Judge Bishop argued that because "the state has acknowledged that the statute of limitations has run ... it is, consequently, barred from reprosecuting the defendant". Williams at 327, note 4. The majority provide no authority for this conclusion which was not based upon any argument or concession made by the State. "An affirmative defense is presented in the orderly course of a criminal trial after the prosecution has presented its case-in-chief." State v. Coleman, 202 Conn. 86, 91 (1987). The issue of whether the statute of limitations had run, and whether the State had acknowledged that the statute of limitations had run, if that were even relevant, would not arise until Defendant was allowed to present evidence in his defense.

> Since the effect of the entry of the nolles [i]s only to terminate this particular prosecution without an acquittal and without placing the defendant in jeopardy, he remains vulnerable to reinstatement of a prosecution against him.

Herring at 57 (1988). A dismissal therefore implicates an accused's Sixth Amendment right not to be twice placed in jeopardy where a nolle does not.

The majority relied heavily on Cislo. But Cislo was civil and not criminal. Cislo involved the indemnification of legal fees and this Court concluded "that an automatic erasure under § 54-142a (c) that occurs thirteen months following the entry of a nolle prosequi constitutes a dismissal *within the meaning of § 53-39a.*" Cislo at 594 (emphasis added). Cislo never attempted to address the question of whether the state was barred from re-prosecuting in a criminal proceeding. Indeed, it was precisely because a nolle does not morph into a dismissal that the Cislo court was required to consider whether a nolle was functionally equivalent to a dismissal for the purposes of indemnification.

The Appellate Court's determination that it now lacks subject matter jurisdiction to consider a motion to dismiss is especially troubling as P.B. § 36-8 permits a State's Attorney to undertake a misdemeanor prosecution by summons without the involvement of a judicial authority. Because "[t]he prosecutor could activate the charges at any time and have the case restored for trial, 'without further order' of the court", the Sixth Amendment's fundamental right to a speedy trial is implicated.

United States v. MacDonald, 456 U.S. 1, 9, note 8 (1982), citing Klopfer. Here in Connecticut, this Court has noted that failure to exercise jurisdiction

> could lead to an indefinite postponement of the criminal proceedings against the defendant that may, under the circumstances, violate his constitutional right to a speedy trial. Klopfer v. North Carolina [at 219-22].

Herring at 56. Because of these concerns, the Court made clear in Lloyd at 207 that judicial oversight was necessary to avoid leaving a defendant "in legal limbo". Now, by dismissing Defendant's appeal, the Appellate Court has permanently locked Defendant into that Klopfer-esque "vacuous place of oblivion" of which this Court warned. Herring at 57.

Finally, the Appellate Court's ruling also has grave consequences for this state's separation of powers doctrine. The legislature, through C.G.S. § 54-142a, attempts to limit what prosecutions the State's Attorneys may bring by initially erasing and ultimately by forcing the physical destruction of the State's Attorneys' records. See §§ 54-142a(c) and (e). Yet the State's Attorneys are constitutionally separate to the legislature. 1965 Const., Art. 4, § 27. See also Massameno v. Statewide Grievance Committee, 234 Conn. 539, 574 (1995). And by holding that the State's Attorney is now precluded from prosecuting Defendant because of the effect of C.G.S. § 54-142a(c), the Appellate Court is not just countenancing the invasion by the legislature into

the exclusive domain of the State's Attorneys, but making that invasion complete.[3]

Similarly troubling is the Appellate Court's countenance of the legislature's interference with the judicial branch's record keeping. C.G.S. §§ 54-142a(c) and (e) also mandate the erasure and physical destruction of court records. Yet this Court has specifically said that "[i]t is essential for the independence of the judicial branch that the courts have control over court records and that the other branches of government not interfere with that control." Clerk at 52. In Clerk, the Commission had ordered the disclosure of those records. Id. at 34-35. The legislature goes well beyond that in also regulating the admissibility of court records and mandating their physical destruction.

But most troubling of all is the conclusion of the Appellate Court that "by operation of statute, the two charges that were nolled were dismissed thirteen months after the plea agreement." Williams at 326. "[D]ismissal is an act of the court". Cislo at 599, note 9. See also P.B. § 39-32. By allowing the legislature to statutorily determine a controversy, the Appellate Court is countenancing the invasion by the

---

[3] Indeed, the intent of the people in passing Amendment Twenty-Three in 1984 was to separate the State's Attorneys from the judicial branch following public disapproval of this Court's decision in State v. Moynahan, 164 Conn. 560, 568, *cert. denied*, 414 U.S. 976 (1973). See the Court's discussion of the topic contained in Massameno at 558-9. The amendment, and P.A. 84-406, § 13 which implemented it, removed the division of criminal justice from the judicial branch. Given the clear intent of the people, it is highly doubtful that even the judiciary now has the authority to interfere in the prosecutorial decisions of the State's Attorneys in this manner.

legislature into the very core of what our judiciary does. Not since the enactment of the 1818 Const., Art. 2, have the people granted to the legislature the authority to assume such judicial responsibilities. Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 592 (1897).[4]

The Appellate Court was required to consider Defendant's claim that a pervasive pattern of judicial misconduct denied him the opportunity for a fair and impartial hearing.

Defendant's appeal before the Appellate Court argued that "judges Swords and Norko so pervasively engaged in judicial misconduct that any ruling by these trial court judges could not objectively be seen as fair and impartial". (Defendant's Brief, Statement of Issues.) Despite this being the central argument in Defendant's appeal, the Appellate Court only addressed the issue through two footnotes:

> The defendant also asserts that a pervasive pattern of judicial misconduct denied him the opportunity for a fair and impartial hearing. The defendant raises this claim for the first time on appeal, and we, therefore, decline to address it. See Embalmers' Supply Co. v. Giannitti, 103 Conn.App. 20, 61, *cert. denied*, 284 Conn. 931 (2007).

---

[4] See also P.T. Zarella & T.A. Bishop, "Judicial Independence at a Crossroads," 77 Conn. B.J. 21, 40 (2003), which warns of the "potential risks to the cherished independence of the judiciary." Judge Bishop authored the Appellate Court's opinion in this appeal.

> The motions to dismiss were denied by Judge Norko after he had recused himself in this matter. Because we dismiss this claim as moot, we do not reach the issue raised by the defendant on appeal regarding the fact that Judge Norko participated in this matter after recusing himself.

Williams at 324, notes 1 and 2.[5]

The State initially raised the claim in its brief that Defendant had a duty to seek the reconsideration of the denial of Defendant's motions to dismiss and to seek the disqualification of Judge Swords before pursuing an appeal. (State's Brief, pp. 8 and 9.) The State provided no legal argument whatsoever in support of their claim. Nonetheless, Defendant devoted four pages of his reply brief to this issue. (Reply Brief, pp. 11-14.) The Appellate Court failed to address *any* of the arguments put forward by Defendant.

In the trial court, the motions were ruled on summarily by Judges Swords and Norko. Indeed, the failure to afford Defendant, or the State for that matter, an opportunity to be heard is one small facet of the "pervasive pattern of judicial misconduct" which Defendant alleges "denied him the opportunity for a fair and impartial hearing." Williams at 324, note 1. Because Defendant was afforded no opportunity to be heard, he had no opportunity to raise his claims of judicial misconduct before the trial

---

[5] Embalmers' Supply does not stand for the principle for which it is cited. Rather, the holding at the point-cite is that "[t]his court will not review claims that are raised for the first time *in a reply brief*." 103 Conn.App. at 61 (emphasis added).

court. Nor did he have any forewarning that either Judge Norko or Judge Swords would decide Defendant's motions. "[T]o consent in open court, the parties must know or have reason to know of the judge's participation in the trial proceedings". Ajadi v. Commissioner of Correction, 280 Conn. 514, 530 (2006). See also C.G.S. § 51-39(c) and Fed.R.Crim.P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.") This state's key waiver case similarly presumes "the opportunity to make an objection". State v. Evans, 165 Conn. 61, 66 (1973).

This Court has been clear that the denial of a motion to dismiss following the entry of a nolle prosequi is an immediately appealable interlocutory order. Lloyd at 207-8. A motion for return of bond is also immediately appealable as a final order. State v. Marro, 68 Conn.App. 849, 854 (2002). See also C.G.S. § 51-183d which makes clear that the proper forum for relief where a judge acts under disqualification is in the appellate courts and Kosnick v. Barton, 93 Conn.App. 99, 105, *cert. denied*, 254 Conn. 941 (2000), which makes clear that raising an issue in the trial court after a matter has become final is to raise it too late. Indeed, had Defendant pursued reconsideration and disqualification, as the Appellate Court asserts that he was required to do, then in all likelihood, he would have lost any opportunity for appellate relief through the passage of time. See State v. Curcio, 191 Conn. 27, 31 (1983); P.B. §§ 61-1 and 63-1.

Judicial bias is considered a structural error. State v. Lopez, 271 Conn. 724, 733 (2004), citing Tumey v. Ohio.

> [Structural error] cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.... Such errors infect the entire trial process ... and necessarily render a trial fundamentally unfair.

Id. See also Cameron, at 168 ("an accusation of prejudice against a judge ... implicates basic concepts of fair trial"). Indeed, Defendant, made clear in his brief that:

> Nor does Defendant now argue that Judges Swords and Norko should have reached a different conclusion based upon the specific facts and legal arguments relevant to these motions. Rather, is it [sic] Defendant's sole contention that based upon a pervasive pattern of violations of the Code of Judicial Conduct by the two trial court judges, it was impossible for Defendant to receive a fair hearing in their courtrooms and therefore, their rulings were unsound and must be vacated.

(Defendant's Brief, p. 26. See also Reply Brief, p. 7.) Nonetheless, the majority applied an abuse of discretion standard to Defendant's claim for return of bond. Williams at 327-28.

In any event, the Appellate Court's refusal to address the judicial misconduct issue has serious

consequences which go well beyond the merits of this specific case. By publicly acknowledging that "a pervasive pattern of judicial misconduct" has been alleged, and that the court is choosing not to address the issue, the Appellate Court leaves the impression, accurate or not, that the judiciary is intentionally avoiding the issue. Williams at 324, note 1. This negative perception is dramatically heightened by the Appellate Court's second footnote in which it said that "motions to dismiss were denied by Judge Norko after he had recused himself" and that, once again, the court would not consider the issue. Williams at 324, note 2. The clear perception is left, rightly or wrongly, that the Appellate Court was relying on procedural mechanisms to avoid reaching difficult and possibly embarrassing issues.[6]

Because of "the risk that unfounded charges of judicial misconduct will impair society's interest in an independent judiciary", this Court has said that allegations of judicial misconduct call for a de novo review. Flanagan at 165. This Court considers that it has "a nondelegable responsibility, upon an appeal, to undertake a scrupulous and searching examination of the record to ascertain whether there was substantial evidence to support the ... factual

---

[6] Defendant is particularly troubled by the Appellate Court's second footnote which leaves the erroneous impression that Defendant's allegations of judicial misconduct relate solely to Judge Norko. While it is true that Judge Norko acted on two separate occasions after recusing himself and that his actions do form a part of the pattern of judicial misconduct which Defendant is alleging, Judge Norko's actions were by no means the most significant or troubling actions in this case. Judge Norko has had a long and distinguished career and Defendant believes it unfair to leave this erroneous impression uncorrected.

findings" Id. While the Court was addressing specifically appeals from the Judicial Review Counsel, it is clear that this case raises the same sorts of sensitive issues of great importance to our society. See also Cameron at 168 ("an accusation of prejudice against a judge 'strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary'").

The Appellate Court denied Defendant procedural due process when it suspended its rules of practice to allow the State to admit a transcript into the appellate record after all briefs had been filed and after oral argument had been had.

The State neglected to make a transcript on which it relied a part of the record on appeal. Upon being informed of this at oral argument, the State sought suspension of the rules to permit the late filing of the transcript. (State's Motion to Suspend the Rules to Permit the Late Filing of Transcript.) This was granted by the Appellate Court over Defendant's strenuous opposition. (Opposition to the State's Motion to Suspend the Rules to Permit the Late Filing of Transcript, Motion for Reconsideration.)

This Court has said that:

> "'[O]ur supervisory authority is not a form of free-floating justice, untethered to legal principle.'" State v. Pouncey, 241 Conn. 802, 813 (1997). Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the

> level of a constitutional violation, is nonetheless "of 'utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole.'" State v. Holloway, [209 Conn. 636, 645 (1989)].... Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance where these traditional protections are inadequate to ensure the fair and just administration of the courts. See State v. Patterson, [230 Conn. 385, 397-98 (1994)]; State v. Holloway, supra, at 645-46.

Hines at 814-5.

The State never argued that the procedure afforded by the appellate rules was inadequate. P.B. § 63-8(e)(2) permitted the State to file its transcript at any time up to the filing of the State's brief. Thus, the State was afforded an adequate procedure to file its transcript. The fact that the State failed to utilize that procedure did not then create a situation where "traditional protections are inadequate to ensure the fair and just administration of the courts."

Furthermore, this Court has made clear that supervisory powers are intended to protect the rights of a *defendant*. See, for example, State v. Reid, 277 Conn. 764, 778 (2006). Indeed, Defendant has failed to turn up even one published case where a court's supervisory powers have been invoked to suspend a procedural rule in favor of the State and to the

detriment of a criminal defendant – and especially to the detriment of a defendant that had himself complied fully with the relevant procedural rules. See the survey of cases at Id. at 795 (Norcott, J., concurring).

This should not surprise. The State can have no constitutionally protected due process rights as the State is not a "person" within the meaning of our federal constitution. See, for example, U.S. Const. Amend. XIV, § 1 ("nor shall any State deprive any *person* of life, liberty, or property, without due process of law") (emphasis added). Here in Connecticut, the people are sovereign and State has only those powers which are specifically granted to it. Appeal of Norwalk St. Ry. at 592. Therefore, all that the State can expect in a judicial proceeding is that the procedural rules be complied with.

Defendant, on the other hand, *does* have federal Fourteenth Amendment protected due process rights. Chief among those rights is the right to a fair procedure. Certainly, a procedure that is modified retrospectively to the benefit of the State and to the detriment of Defendant cannot be termed a fair procedure. The retrospective modification of procedural rules amounts to arbitrary action and "[t]he touchstone of due process is protection of the individual against arbitrary action of government". Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

Defendant also has a Fourteenth Amendment protected due process right to notice and a meaningful opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948). Defendant did not have notice that the newly admitted transcript would form a part

of the record when he prepared his reply brief or even at the time that oral argument was held. This Court has said that "[i]f the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties and allowing argument regarding that issue." State v. Dalzell, 282 Conn. 709, 715 (2007). The Appellate Court did neither.

Nonetheless, the majority, in a footnote, held that:

> [B]ecause the defendant did not object to the nolles at the time they were entered, and, in fact, the nolles were part of a plea bargain between the defendant and the state, he has waived any claim that the charges should have been dismissed.

Williams at 327, note 6. And Judge Flynn similarly found that:

> The record is clear that the defendant made a plea agreement to accept a nolle on the remaining charges.... [H]e accepted the plea agreement on the record and specifically acknowledged that these were the terms of the plea agreement.

Williams at 328-29 (Flynn, C.J., concurring). In fact, the transcript is inconclusive on this point. When the State, in a long colloquy, states that "[t]he State ...pursuant to a plea bargain agreement, has agreed to enter a nolle", Defendant's only response is "I have nothing to say, your Honor." (T., 4 April 2008, p. 3.) The transcript certainly contains nothing which could arguably support Judge Flynn's assertion that

Defendant "specifically acknowledged that these were the terms of the plea agreement".

It is apparent that the Appellate Court suspended the rules and admitted the transcript in an attempt to coalesce around this one basis. Determining the facts was a method whereby the Appellate Court could avoid deciding Defendant's sensitive judicial misconduct claims. But without the factual evidence in the record, it would have been impossible for the Appellate Court to have determined those disputed facts.[7] Indeed, following the admission of the State's transcript, but prior to the Appellate Court releasing its opinion, Defendant predicted just this outcome:

> But most troubling of all, this appeal is particularly sensitive in that it involves accusations of judicial misconduct leveled by Defendant at two well respected Superior Court judges. Perceptions of favoritism towards the State by this panel might easily be viewed as an attempt by the panel to avoid a decision which is favorable to Defendant and therefore critical of fellow Connecticut judges or, at the least, an attempt by this Court to find an alternative basis for deciding the case so as to avoid reaching the claims of judicial misconduct. Obviously, either perception carries with it a grave risk of jeopardizing our judicial system as a whole.

---

[7] "It is the function of the trial court, not [an appellate] court, to find facts." State v. Lafferty, 189 Conn. 360, 363 (1983). See also Miller v. Westport, 268 Conn. 207, 221 (2004).

(Motion for Reconsideration.)[8]

This Court has said that a court's supervisory authority may only be invoked where it is necessary "for the perceived fairness of the judicial system as a whole." Hines at 814-5. The Appellate Court's action not only fails to *enhance* the perception of fairness in our judicial system, but leaves the distinct impression of an *unfair* judicial system.

Respectfully submitted,

Stephen J. Williams,
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
Tel. +1-860-450-1288

---

[8] The Appellate Court's policy of chilling claims alleging judicial misconduct is made plain by Judge Bishop's recent comment that "mere claims of judicial misconduct, unmoored to the constitutional rights of a litigant and unclaimed for plain error review, should not find a hospitable response on direct appeal." Embalmers' Supply at 69 (Bishop, J., concurring). See also O'Brien v. Superior Court, 105 Conn.App. 774, 797-805 (2008) (DiPentima, J., concurring in part, dissenting in part) (criticizing attorney for requesting an investigation).

J. State's Opposition to Defendant's Petition for Certification (28 April 2008)

A.C. 26901(MV04-392089 and MV05-394080)

STATE OF CONNECTICUT	: SUPREME COURT
	: STATE OF
V.	CONNECTICUT
STEPHEN J. WILLIAMS	: APRIL 28, 2008

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR CERTIFICATION

Pursuant to Practice Book § 84-6 and for the reasons discussed below, the State of Connecticut opposes the defendant's petition for certification from the Appellate Court's Decision in State v. Williams, 106 Conn. App. 323 (2008). The Appellate Court's Ruling correctly found that it lacked subject matter jurisdiction to rule on the defendant's May 26, 2005 motion to dismiss because the state had entered nolles on those charges at the time of a plea agreement, and the defendant's probationary period had been completed on May 4, 2005. Accordingly, the defendant's claim was moot. Furthermore, the Appellate Court's allowing the state to file a late transcript of the plea bargain and the accelerated rehabilitation proceedings that provided the record for the defendant's appeal was entirely within its discretion. As there is no conflict with any rulings of the Appellate or this Court and the opinion presents

no policy considerations, no additional review is warranted.

QUESTIONS PRESENTED

The defendant presents three issues:

1. Did the Appellate Court correctly find that it lacked subject matter jurisdiction to hear the defendant's May 26, 2005 motion to dismiss because the charges at issue had already been dismissed on May 4, 2005 by operation of statute?

2. Did the Appellate Court correctly refuse to address the issue of judicial misconduct because it did not have subject matter jurisdiction.

3. Did the Appellate Court abuse its discretion in permitting the state to file a late transcript of the plea agreement and the accelerated rehabilitation proceedings which formed the basis of the appeal,[1] after the defendant had ordered the transcript but did not file it with the Court?

I. BRIEF HISTORY OF THE CASE

In docket number MV04-392089, the defendant was charged with reckless driving, in violation of General Statutes § 14-222. When the defendant failed to appear in court on January 4, 2005, he was charged

---

[1] The April 4, 2005 proceedings are included in the state's appendix to this document.

with failure to appear in the second degree, in violation of General Statutes § 53a-173.

In docket number MV05-394080, the defendant was stopped on February 23, 2005 and was charged with driving while under suspension, in violation of General Statutes § 14-215.

On July 26, 2004, the defendant appeared before the Honorable Allen W. Smith entered a "not guilty" plea, and requested a jury trial. When the court specifically asked the defendant if he wanted to have accelerated rehabilitation, the defendant refused. The defendant also moved to reduce his bail, which was $1,000 cash bond. The court lowered the bond to $250 cash and directed the defendant to go to the clerk's office and get $750 back.

On November 18, 2004 the defendant was scheduled to appear before the Honorable Patricia A. Swords. The marshal advised the court that the prosecutor was looking for the defendant. When the prosecutor came into the courtroom, she reported to the court that the defendant was not in Courtroom A or in the hallway, asked that all motions be denied, and requested a rearrest. The court ordered that the bond be called, noting that the bond had been reduced to $250. When the defendant did not appear, it ordered that the bond be forfeited, ordered a rearrest and set bond at $10,000 cash or surety.

The defendant appeared later that day, when court was back in session, and the court explained that it had ordered a rearrest at 10:05 because the defendant was not in court. The defendant explained that he was having trouble with security, was in line

at 10 a.m., and was sitting in Courtroom A. The prosecutor countered that she had been in Courtroom A looking for the defendant and that she had canvassed Courtroom A; in fact Judge Norko came on the bench and the defendant was not there. She had also walked through the hallway, and the defendant was not there.

The court vacated its rearrest order, and then heard argument on the motions filed. The court denied the defendant's motion for modification of bail, noting that the defendant has few, if any ties to Connecticut, is not employed in Connecticut, is not a resident of Connecticut, does not possess a Connecticut driver's license, and has a residence in a foreign country. After ruling on the defense motions, the court reinstated the bond forfeited at 10.05. The court advised the defendant that he needed to get to court at 9 am to get through the door for 10 a.m. It also admonished him: "And you should know that as an officer of the court." The court increased the defendant's bond, which would be a total of $500 cash ($250 of which was already posted) or $2500 in surety, whichever is easier or more convenient." (Emphasis added). Id. at 21.

On January 4, 2005, before Judge Swords, again the defendant was not present at 10 a.m., and the state asked for a rearrest, stating that the defendant was not in Courtroom A, either. The court asked the marshal to canvass the hallway "to err on the side of caution." She also asked him to check if anyone was in line at the metal detector. T. 1/4/05 at 2. Although the bond had been increased to $500, the record does not show that it was posted. The court ordered that $500 in bond be forfeited. The court ruled that, in

light of another failure to appear out of another court, his failure to appear for trial, and because there was a jury in the building, it would set bond at $10,000 cash or surety. It also noted for the record that the time was 10:12 a.m.

The next appearance was on February 23, 2005 before the Honorable Raymond R. Norko, J. The court stated that because he and the defendant had a mutual friend, it would withdraw from any further attention to the file, and that Judge Swords would hear argument on the defendant's Motion to Compel.

On April 4, 2005, before the Honorable Allen W. Smith, J.T.R., the defendant was sworn in for an application for accelerated rehabilitation. Pursuant to the plea agreement, state entered nolles to the failure to appear charge and operating under suspension charge in the second pending file. The state did not object to a 30-day probationary period for accelerated rehabilitation, pursuant to General Statutes § 54-56e; accordingly, the charge would be dismissed in 30 days, on May 4, 2005. The trial court accepted the defendant's application for accelerated rehabilitation for the reckless driving charge.

On May 26, 2005, the defendant filed motions to dismiss the charge for driving while under suspension, asserting that, in accordance with the plea agreement, it, too, should have been dismissed on May 4, 2005, when the reckless driving charge was dismissed. On May 27, 2005, the court denied the motion.

On June 9, 2005, the defendant filed a First Motion for Return of Bond posted to the reckless driving

charge. The court granted the defendant's motion, ordering that $250 be returned to the defendant's mother, Barbara Williams. It ruled that, when the defendant returned to court within six months of its forfeiture, the bond was automatically reinstated. Also on June 9, 2005, the defendant filed a second motion for return of Bond. The defendant himself had posted this $250 cash bond. The court denied this second motion.

On June 16, 2005, the defendant filed an appeal from the denial of his motions to dismiss and from his denial of his second motion for return of bond.

II. REASONS FOR DENYING THE PETITION

A The appellate Court correctly found that the defendant's objection to the nolles instead of dismissals is moot because the charges have been dismissed and no practical relief can be afforded to the defendant.

The defendant first contends that the two additional charges which grew out of his case, specifically the failure to appear in the second degree and the operating under suspension, should have been dismissed rather than nolled.[2] The Appellate Court correctly rejected his claims because (1) the plea agreement required nolles and not dismissals; and (2) the appeal is moot because more than thirteen months have passed and no practical relief is available.

---

[2] The defendant specifically disavows any claim that he is innocent of the original charge of Reckless Driving or of the two subsequent charges or Failure to Appear and Operating under Suspension.

First as the Appellate Court found, the claim is moot. "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." State v. Anonymous (1987-1), 11 Conn. App. 224(1987), quoting State v. Macri, 189 Conn. 568, 569(1983). Because mootness implicates the court's subject matter jurisdiction, it is, therefore, a threshold matter to resolve. State v. Aquino, 89 Conn. App. 395,399(2008)(dismissing case as moot). "If an actual controversy does not exist between the parties, both when the appeal is filed and through the pendency of the appeal, then the case has become moot. Id., at 205, 802 A 2d 74; Williams v. Ragaglia, 261 Conn. 219, 225, 802 A.2d 778 (2002)." State v. Eastman, 92 Conn. App. 261, 263-264, 884 A.2d 442 (2005). Where the question presented is purely academic, this court must refuse to entertain the appeal. State v. Anonymous(1987-1), 11 Conn. App. at 226.

In this case, the question is purely academic. Because more than thirteen months have passed since the nolles were entered, the erasure provisions of General Statutes § 54-142a are applicable. Pursuant to subsection (c). all criminal records of a nolled charge are erased after thirteen months from the entry of the nolle. Subsection (e) prohibits the court clerk or any other person controlling the records from disclosing any information regarding the erased charge. General Statutes § 54-142a prevents the state from reactivating the nolled

charges and places the defendant in the same position he would have been had the charges been dismissed. A nolle ends the proceedings and does not place the defendant in jeopardy. State v. Gaston, 198 Conn. 435, 440(1986). The defendant could have been tried again only if the state had filed a new information and new arrest within thirteen months of the nolle; State v. Lloyd, 185 Conn. 199, 201 (1981); which it did not do. The two counts that were nolled were dismissed thirteen months after the plea agreement, by operation of statute as of May 4, 2006. As a result, the defendant is in exactly the same position he would have been in had the court granted his motion to dismiss. Because the nolles were granted on April 4, 2005, and more than thirteen months have elapsed, the erasure statute has expunged any record of the defendant's arrest. At this point in time, the same result would have obtained had the court dismissed the charges. See, e.g., Cislo v. City of Shelton, 240 Conn. 590 (1997)(legislature considered passage of a thirteen-month period after nolle to be constitutionally mandated and thus the equivalent of a dismissal.); State v. Lenczyk, 11 Conn. App. 224, 225 (1987). As the relief he sought was the same as he now enjoys, there is no case or controversy before the court.[3]

---

[3] Nor is there any risk of collateral consequences, as the statute of limitations is not tolled by the entry of a nolle. The defendant's charge for failure to appear, a Class A misdemeanor, has a one-year statute of limitations, pursuant to General Statutes § 53a-173. The charge for driving while under suspension is a violation which is resolved with the payment of a fine, pursuant to General Statutes § 14-215. Therefore neither of the nolled charges have any collateral consequences.

Second, the record indicates that there was a plea agreement struck between the defendant, appearing pro se, and the state, whereby the defendant would accept accelerated rehabilitation, pursuant to General Statutes § 54-56e on the reckless driving count. The state had agreed to nolle the two other charges for failure to appear and operating under suspension. General Statutes § 54-56b provides, in relevant part: "A nolle prosequi may not be entered as to any count in a complaint or information if the accused objects to the nolle prosequi and demands either a trial or dismissal..." (emphasis added). Pursuant to Practice Book § 39-30, any objection to the state's entry must be made at the time of the nolle (Emphasis added). Accordingly, absent a timely objection and adverse ruling, appeals from a nolle will not ordinarily lie. See, e.g., Frey v. Maloney, 476 F. Supp. 2d 141 (D. Conn. 2007) (District court ruled that termination to criminal charges against a party were abandoned when the prosecutor entered the nolle, not when this Court denied the plaintiff's interlocutory appeal. "Indeed, it appears that Plaintiffs' appeal became moot after entry of the nolle and dismissal of the charges.. " Id. at 149; State v. Paradis, 2006 WL853165 (state's entry of nolle would effectively extinguish defendant's right to appeal). The defendant cannot now object, seeking relief when he, in fact, agreed to accept the nolles as part of the plea agreement.

B. The Appellate Court correctly refused to review the defendant's unpreserved claim of judicial misconduct as also moot

The defendant's contention concerning judicial misconduct must fail for three reasons. First,

because the defendant's claim of judicial misconduct matter is moot, the defendant has no case or controversy. He would be unable to prevail even had he made an argument under Golding. As there is no practical relief available because the state nolled two files and the defendant's probationary period has ended, his claim cannot be reviewed by this Court.

Second, the claim was unpreserved. For the first time on appeal, the defendant claimed that Judges Swords and Norko engaged in a pervasive pattern of violations of the Code of Judicial Conduct that made it impossible for the defendant to receive a fair hearing. Therefore, their rulings were "unsound and must be vacated." Defendant's brief to the Appellate Court at 26. Despite this, he conceded that the judges should not have reached a different conclusion. The defendant also raised an unpreserved claim of judicial misconduct; however, he failed even to request review under State v. Golding, 213 Conn. 233, 239-40 (1989). His failure to brief a claim of entitlement to review under Golding rendered his claim unreviewable. State v. Marsala, 93 Conn. App. 582(2006); State v. Morgan, 274 Conn. 790 (2005). As he may not do so for the first time in his reply brief; State v. Garvin, 242 Conn. 296, 312(1997); his unpreserved claim of judicial misconduct was also unreviewable.

Third, even had he sought Golding review, he does not claim any constitutional violation because he states: "Nor does Defendant now argue that Judges Swords and Norko should have reached a different conclusion based upon the specific facts and legal arguments relevant to these motions." but that because of a "pervasive pattern of violations of the

Code of Judicial Conduct," their rulings were unsound. Defendant's brief to Appellate Court at 26. If the judges would not have reached a different conclusion, he cannot demonstrate a fundamental unfairness with the proceedings or miscarriage of justice, as he must under Golding. Furthermore, even had another judge ruled on the motion, in light of the plea agreement which included the agreement to accept a nolle, there could be no other outcome.

C. The Appellate Court did not abuse its discretion in permitting the state to file the transcript of the plea agreement and the accelerated rehabilitation proceedings that provided the basis of the appeal when the state at oral argument discovered that the defendant had ordered the transcript but had not filed it[4]

---

[4] The defendant had ordered, and the state had received, a copy of the transcript of April 4, 2005. In his "Statement of Transcripts to Be Relied Upon, dated September 19, 2005, the defendant stated that he would be relying upon the transcript, inter alia, of "4 April 2005, Judge Smith" (appended to this document.) In the defendant's Motion For Permission to Amend The Transcript Statement dated February 27, 2006, he stated that he had originally included the "Judge Smith, 4 April 2005 transcript in his transcript statement, (also appended to this document). Based on these representations, the state believed that the defendant had filed the April 4, 2005 transcript as well.

At oral argument on September 24, 2007, the state was relying on the April 4, 2005 transcript to point out that the nolles which the defendant were challenging were, in fact, part of a plea agreement that included accelerated rehabilitation. This information was reflected in the transcript of April 4, 2005, wherein the defendant stated, "this was a plea bargain agreement between the two of us." T. April 4, 2005 at 4. The court advised the state that it did not have that transcript

The defendant's petition that is based on the Appellate Court's granting the state permission to file the transcript of the relevant proceedings is meritless for two reasons. First, absent the transcript before the court, there would have been no record for the Appellate Court to review. It is utterly mystifying to the state to discern what possible advantage a defendant thinks he can obtain by ordering and then refusing to file the very transcript that provides the record of the proceeding he is challenging. Should the court review this claim and reverse the Appellate Court, it would remove from consideration the record that defendant needs to have before the Court in order to have his case adjudicated.

Second, the Appellate Court's ruling fails to raise any of the issues listed in Practice Book § 84-2 and does not fall within the range of the "character of the reasons which will be considered" whatsoever. Accordingly, this Court should deny certification on this issue as well.

CONCLUSION

For all these reasons, the state asks this Court to deny the defendant's petition for certification.

---

before it. On rebuttal, in response to Chief Judge Flynn's inquiry, the defendant stated that he had not filed it.

After oral argument, the state moved for, and received permission from the Appellate Court to file the April 4, 2005 transcript, which contains the proceedings pertaining to the defendant's agreement with the state for disposition of his case byway of accelerated rehabilitation and nolles for two other offenses.

III LEGAL GROUNDS RELIED UPON

The state files this motion pursuant to Practice Book § 84-6.

Respectfully Submitted,

STATE OF CONNECTICUT
/s/
By: RITA M. SHAIR
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax. (860) 258-5628
Juris # 401857

K. Petitioner's Notice of Supplemental Authorities (2 May 2008)

Michèle T. Angers, Esq.
Chief Clerk
Connecticut Supreme Court
231 Capitol Avenue
Hartford, Connecticut 06106

Dear Attorney Angers,

State v. Williams, 106 Conn.App. 323 (2008)

Defendant draws the Supreme Court's attention to the supplemental authority of *State v. Winer*, 286

Conn. 666, 2008 WL 1787673 (2008), which was decided by this Court on 29 April, or one day following the State's filing of its opposition to Defendant's petition for certification.

Winer is significant because it brings into doubt the continued viability of *Cislo v. Shelton*, 240 Conn. 590 (1997), which formed the cornerstone of the Appellate Court's opinion. *Williams* at 326-27. Indeed, the State cites *Cislo* for the holding that the "legislature considered passage of a thirteen-month period after nolle to be constitutionally mandated and thus the equivalent of a dismissal." State's Opposition, p. 6. *Winer* directly repudiates this holding ("the court should not have ascribed an intent to the legislature generally because of one legislator's retrospective interpretation of the motivation behind the 1972 amendment"). *Winer* at *7. This Court now considers that C.G.S. § 54-142a was "not [designed] to provide new substantive protections for defendants." Id. Obviously, this undermines the State's central premise that § 54-142a afforded Defendant a dismissal.

This letter was served by post on Rita M. Shair, Esq., Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, Connecticut 06067.

Sincerely,

Stephen J. Williams

L. Petitioner's Motion for Reconsideration (23 May 2008)

Docket Nos. PSC-07-0343, AC26901, MV04-392089 & MV05-394080	Connecticut Supreme Court
State of Connecticut vs. Stephen J. Williams	23 May 2008

MOTION FOR RECONSIDERATION

Pursuant to P.B. § 71-5, Defendant/Petitioner moves this Court to reconsider its order dated 13 May 2008 denying Defendant's Petition for Certification.

Brief History of the Case

Defendant sough the dismissal of two charges which had previously been nolled by the prosecution and the return of bond which had previously been forfeited by the trial court. All motions were denied by the trial court.

Defendant appealed these determinations to the Appellate Court arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." The Appellate Court did not reach the question. Rather, it dismissed Defendant's appeal as regards the dismissal of the charges as moot and affirmed the trial court's refusal to return the bond after applying an abuse of discretion standard. State v. Williams, 106 Conn.App. 323 (2008).

Specific Facts Relied Upon

In a split decision, the majority relied on Cislo v. Shelton, 240 Conn. 590 (1997). Williams at 326-7. Specifically, the Appellate Court agreed with the State that "by operation of statute, the two charges that were nolled were dismissed thirteen months after the plea agreement." Id. at 326. Specifically, the lower court, quoting Cislo, held that "General Statutes § 54-142a(c) uses the term 'nolle' in a 'context that renders the provisions of § 54-142a(c) the functional equivalent of a dismissal'". Id.

On 29 April, this Court decided State v. Winer, 286 Conn. 666 (2008), in which it held that § 54-142a was "not [designed] to provide new substantive protections for defendants." Winer at 683. Winer directly overruled Cislo on the point relied upon by the Appellate Court.

Defendant's Petition for Certification was filed on 18 April. The State's opposition was filed on 28 April. Defendant file a notice of supplemental authorities on 2 May drawing the Court's attention to Winer. Nonetheless, on 13 May, this Court denied Defendant's Petition for Certification.

Legal Grounds

This Court abused its discretion when it denied certification to appeal in a case which has been invalidated by subsequent controlling precedent of this Court.

Certification is "a matter of ... sound judicial discretion" where

> [d]iscretion imparts something more than leeway in decision making. It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.

P.B. § 84-2; State v. Martin, 201 Conn. 74, 88 (1986) (internal punctuation and citations omitted).

The standards for certification of an appeal in this Court are similar to those for certiorari in the U.S. Supreme Court. Compare the guidelines enumerated in P.B. § 84-2 with those contained in Sup. Ct. R. 10. There is, however, one major distinction. In the U.S. Supreme Court, justice to the individual litigant is not a necessary consideration. See the last paragraph of Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Our § 84-2 contains no such limitation. Indeed, this Court has stated that it is required to "determine whether the petition raises a substantial question which should be considered by us in the interests of justice to the particular

litigants". State v. Cullum, 149 Conn. 728, 730 (1961).

This Court's consideration on a petition for certification to appeal from the Appellate Court is similar to that applied by a reviewing court to the denial of certification to appeal in a habeas corpus proceeding. In both circumstances, an appellate court must apply an abuse of discretion standard to consider the appearance of justice:

> "[A] disappointed habeas corpus litigant [may] invoke appellate jurisdiction for plenary review of the decision of the habeas court upon carrying the burden of persuasion that denial of certification to appeal was an abuse of discretion or that injustice appears to have been done.... The Supreme Court adopted this test in Simms v. Warden, 230 Conn. 608, 612, 646 A.2d 126 (1994) ... and stated that the petitioner must first show that the habeas court's decision was an abuse of discretion. To establish an abuse of discretion, the petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.... If the appeal meets one of the criteria set forth in [Simms v. Warden, supra, at 608, 646 A.2d 126], the habeas court's failure to grant certification to appeal constitutes an abuse of discretion.

Holmes v. Commissioner of Correction, 107 Conn.App. 662, 664-5 (2008). Needless to say, where

subsequent controlling precedent has overruled the holding of the lower court, "the issues are debatable" and in fact, would be expected to be resolved "in a different manner". Id.

Ordinarily, this Court has broad discretion to determine a petition for certification. Here, however, in this unusual situation where this Court has overruled the precedent on which the Appellate Court relied, this Court had no discretion whatsoever and was required to certify the appeal so as to correct the error in the court below. Failure to grant certification "impede[d] or defeat[ed] the ends of substantial justice." Martin, supra. Therefore, this Court abused its discretion when it denied certification to appeal.

Denial of certification where the case had been invalidated by subsequent controlling decision of this Court violated the due process clause of the federal Fourteenth Amendment.

All agree that the federal Fourteenth Amendment, at the very least, requires "that our Government must proceed according to the 'law of the land'-that is, according to written constitutional and statutory provisions as interpreted by court decisions." Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (Thomas, J., dissenting), quoting In re Winship, 397 U.S. 358, 382, 90 S.Ct. 1068, 1082, 25 L.Ed.2d 368 (1970) (Black, J., dissenting).

Therefore, the failure of this Court to certify the appeal, where the Appellate Court's decision directly contravenes statutory provisions as subsequently interpreted by this Court, denied Defendant

minimum procedural due process as guaranteed by our federal constitution.

Indeed, even though the U.S. Supreme Court is not required to consider the interests of justice in determining a petition for writ of certiorari, it is still the practice of that court to grant certiorari, vacate the decision of the lower court, and remand for determination in light of subsequent controlling precedents. Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996). This is done in the interest of fairness. Id. at 168, 115 S.Ct at 607.

Conclusion

For the foregoing reasons, this Court must vacate its order of 13 May 2008 and grant certification to appeal.

Respectfully submitted,

Stephen J. Williams,
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
Tel. +1-860-450-1288

M. State's Opposition to Defendant's Motion for Reconsideration (4 June 2008)

Docket Nos. A.C. 26901

MV04-392089 and MV05-394080

STATE OF CONNECTICUT	: SUPREME COURT
	: STATE OF
V.	CONNECTICUT
STEPHEN J. WILLIAMS	: JUNE 4, 2008

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

Pursuant to Practice Book § 84-6 and for the reasons discussed below, the State of Connecticut opposes the defendant's motion for reconsideration of this Court's order denying his petition for certification from the Appellate Court's decision in State v. Williams, 106 Conn. App. 323 (2008). Contrary to the defendant's argument, this Court's ruling in State v. Winer, 286 Conn. 666 (2008), does not affect the Appellate Court's ruling in Williams because the correction concerning Cislo v. Shelton, 240 Conn. 590 (1997) was of the Appellate Court's construction of 54-142a(c) as a speedy trial statute, not at issue here. This Court's ruling in Winer does not require reconsideration of its denial of the defendant's petition for certification.

I. BRIEF HISTORY OF THE CASE

In docket number MV04-392089, the defendant was charged with reckless driving, in violation of General Statutes § 14-222. When the defendant failed to appear in court on January 4, 2005, he was charged with failure to appear in the second degree, in violation of General Statutes § 53a-173.

In docket number MV05-394080, the defendant was stopped on February 23, 2005 and was charged with driving while under suspension, in violation of General Statutes § 14-215.

On July 26, 2004, the defendant appeared before the Honorable Allen W. Smith, entered a "not guilty" plea, and requested a jury trial. When the court specifically asked the defendant if he wanted to have accelerated rehabilitation, the defendant refused. T. 7/26/04 at 2. The defendant also moved to reduce his bail, which was $1,000 cash bond. The court lowered the bond to $250 cash and directed the defendant to go to the clerk's office and get $750 back. Id. at 4.

On November 18, 2004, the defendant was scheduled to appear before the Honorable Patricia A. Swords. The marshal advised the court that the prosecutor was looking for the defendant. When the prosecutor came into the courtroom, she reported to the court that the defendant was not in Courtroom A or in the hallway, asked that all motions be denied, and requested a rearrest and set bond at $10,000 cash or surety. T. 11/18/03 at 3.

The defendant appeared later that day, when court was back in session, and the court explained that it had ordered a rearrest at 10:05 because the defendant was not in court. The defendant explained that he was having trouble with security, was in line at 10 a.m. and was sitting in Courtroom A. The prosecutor countered that she had been in Courtroom A looking for the defendant and that she had canvassed Courtroom A; in fact Judge Norko came on the bench and the defendant was not there.

She had also walked through the hallway and the defendant was not there.

The court vacated its rearrest order, and then heard argument on the motions filed. The court denied the defendant's motion for modification of bail, noting that the defendant has few, if any ties to Connecticut, is not employed in Connecticut, is not a resident of Connecticut, does not possess a Connecticut driver's license, and has a residence in a foreign country. After ruling on the defense motions, the court reinstated the bond forfeited at 10:05. The court advised the defendant that he needed to get to court at 9 am to get through the door for 10 a.m. It also admonished him "And you should know that as an officer of the court." The court increased the defendant's bond, which would be a total of $500 cash ($250 of which was already posted) or $2500 surety "or $2500 in surety, whichever is easier or more convenient (Emphasis added). Id. At 21.

On January 4, 2005, before Judge Swords, again the defendant was not present at 10 a.m., and the state asked for a rearrest, stating that the defendant was not in Courtroom A, either. The court asked the marshal to canvass the hallway "to err on the side of caution." She also asked him to check if anyone was in line at the metal detector. T. 1/4/05 at 2. Although the bond had been increased to $500, the record does not show that it was posted. The court ordered that $500 in bond be forfeited. The court ruled that, in light of another failure to appear out of another court, his failure to appear for trial, and because there was a jury in the building, it would set bond at $10,000 cash or surety. It also noted for the record that the time was 10:12 a.m.

The next appearance was on February 23, 2005 before the honorable Raymond R. Norko, J. The court stated that because he and the defendant had a mutual friend, it would withdraw from any further attention to the file, and that Judge Swords would hear argument on the defendant's Motion to Compel.

On April 4, 2005, before the Honorable Allen W. Smith, J.T.R. the defendant was sworn in for an application for accelerated rehabilitation. T. 4/4/05 at 3. Pursuant to the plea agreement state entered nolles to the failure to appear charge and operating under suspension charge in the second pending file. The state did not object to a 30-day probationary period for accelerated rehabilitation, pursuant to General Statutes § 54-56e, accordingly, the charge would be dismissed in 30 days, on May 4, 2005. The trial court accepted the defendant's application for accelerated rehabilitation for the reckless driving charge.

On May 26, 2005, the defendant filed motions to dismiss the charge for driving while under suspension, asserting that, in accordance with the plea agreement, it, too, should have been dismissed on May 4, 2005, when the reckless driving charge was dismissed. On May 27, 2005, the court denied the motion.

On June 9, 2005, the defendant filed a First Motion for Return of Bond posted for the reckless driving charge. The court granted the defendant's motion, ordering that $250 be returned to the defendant's mother, Barbara Williams. It ruled that, when the defendant returned to the court within six months of

its forfeiture, the bond was automatically reinstated. Also on June 9, 2005, the defendant filed a second motion for return of Bond. The defendant himself had posted this $250 cash bond. The court denied this second motion.

One June 16, 2005, the defendant filed an appeal from the denial of hid motions to dismiss and from his denial of his second motion for return of bond.

II. REASONS FOR DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION.

The defendant's argument that this Court's ruling in State v. Winer directly overruled Cislo on the point relied upon by the Appellate Court is incorrect; furthermore, the defendant's argument does not affect the outcome of the Appellate Court's ruling.

First the defendant's challenge to the Appellate Court was that the two additional charges which grew out of this case, specifically the failure to appear in the second degree count and the operating under suspension count, should have been dismissed rather than nolled.[1] The defendant did not request a dismissal at the time the nolles were entered, as he must, pursuant to General Statutes § 54-56b and Practice Book § 39-30. The Appellate Court correctly rejected his claims because (1) the plea agreement required nolles and not dismissals; and (2) the appeal is moot because more than thirteen months have passed and no practical relief is available.

---

[1] The defendant specifically disavows any claim that he is innocent of the original charge of Reckless Driving or of the two subsequent charges.

Nothing in its analysis is affected by the Court's ruling in Winer.

Second, this Court's ruling in State v. Winer, 286 Conn. 666 (2008) did not turn on the difference between erasure and dismissal; in fact, this Court did not address that issue.[2] Instead, in Winer, this Court ruled that the Appellate Court had misconstrued the intent of 54-142a (c) as a speedy trial statute and, as a result, misinterpreted and misapplied the statutory language included therein, specifically "continued at the request of the prosecuting attorney" and "no prosecution." This Court held that the Appellate Court's interpretation of the statute as a speedy trial statute that resulted in a determination that the state's conduct had triggered its nolle and erasure provisions was erroneous; therefore, the Appellate Court's order to dismiss the charges under 54-142a (c) based on its analysis of the statutory language was improper.

Here, in contrast, the Appellate Court did not base its resolution of the defendant's first claim on its interpretation of the prosecuting attorney's request. Its discussion of 54-142a(c)[3] focused on the term

---

[2] In Winer, this Court never reached the issue of whether erasure and dismissal are conceptually distinct. Winer, 286 Conn. at 667.

[3] § 54-142a provides, in pertinent part:

Eras ure of criminal records

(c) Whenever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased. However, in cases of nolles entered in the Superior Court, Court of Common Pleas, Circuit Court,

"nolle" that renders the provisions of 142a (c) the functional equivalent of a dismissal: "Although they have some doctrinal and procedural differences ... in some legal respects they are treated as fungible," relying on this Court's rulings in State v. Gaston, 198 Conn. 435, 440 (1986) and State v. Gosselin, 133 Conn. 158, 160-61 (1946). Thus, it correctly found that the defendant's belated objection to the nolles instead of dismissals was moot because the charges have been dismissed and no practical relief can be afforded to the defendant.

Clearly, then, this Court's ruling in Winer has no effect on the correctness of the Appellate Court's ruling. The record in this case presents an entirely different factual scenario from that presented in Winer. There was no issue with respect to an interpretation of 53-142a (c) as a speed trial statute. Thus, this Court's ruling similarly has no effect on the Appellate Court's decision in Williams.

---

municipal court or by a justice of the peace prior to April 1, 1972, such records shall be deemed erased by operation of law and the clerk or the person charged with the retention and control of such records shall no disclose to anyone their existence or any information pertaining to any charge so erased, provided nothing in this subsection shall prohibit the arrested person or any one of his heirs from filing a petition to the court or to the records center of the Judicial Department, as the case me be, to have such records erased, in which case such records shall be erased. Whenever any charge in a criminal case has been continued at the request of the prosecuting attorney, and a period of thirteen months has elapsed sine the granting of such continuance during which period there has been no prosecution or other disposition of the matter, the charge shall be construed to have been nolled as of the date of termination of such thirteen-month period and such erasure may thereafter be effected or a petition filed therefor, as the case may be, as provided in this subsection for nolled cases.

Accordingly, the recent decision in Winer affords no basis to justify reconsideration of this Court's denial of the defendant's petition for certification.

In sum, the Appellate Court correctly ruled that the defendant's claim is moot. See, e.g., State v. Lenczyk, 11 Conn. App. 224, 225 (1987) (state nolled charges; court denied defendant's motion to dismiss some counts; because more than thirteen months had passed since the nolles were entered, the erasure provisions of General Statutes § 54-142a applied; defendant is in same position he would have been had court granted his motion, question is purely academic; Appellate Court refused to entertain appeal because there was nc actual case or controversy).[4]

Therefore, the state asks this Court to deny the defendant's motion for reconsideration of its denial of his petition for certification; alternatively, should this Court grant his motion and reconsider its denial, this Court should again conclude that certification is not at all warranted, even in light of State v. Winer.

III. LEGAL GROUNDS RELIED UPON

The state files this motion pursuant to Practice Book § 84-6.

Respectfully Submitted,

STATE OF CONNECTICUT
/s/

---

[4]Nor is there any risk of collateral consequences, as the statute of limitations is not tolled by the entry of a nolle.

By: RITA M. SHAIR
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax. (860) 258-5628
Juris # 401857

N. Petitioner's Motion for Permission to File Letter Bringing to the Court's Attention a Misstatement of the Proceedings Below, an Incorrectly Credited Quotation and Erroneous or Misleading Citations Contained in the State's Opposition to Defendant's Motion for Reconsideration (13 June 2008)

Docket Nos. PSC-07-0343, AC26901, MV04-392089 & MV05-394080	Connecticut Supreme Court
State of Connecticut vs. Stephen J. Williams	23 May 2008

MOTION FOR PERMISSION TO FILE LETTER BRINGING TO THE COURT'S ATTENTION A MISSTATEMENT OF THE PROCEEDINGS BELOW, AN INCORRECTLY CREDITED QUOTATION AND ERRONIOUS OR MISLEADING CITATIONS CONTAINED IN THE STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

Pursuant to P.B. § 60-2 and this Court's inherent power to supervise and control the proceedings, Defendant/Petitioner moves for permission to file the letter dated today bringing to the Court's attention the State's misstatement of the proceedings below, an incorrectly credited quotation and erroneous or misleading citations contained in their Opposition to Defendant's Motion for Reconsideration dated 4 June 2008.

Brief History of the Case

Defendant sough the dismissal of two charges which had previously been nolled by the prosecution and the return of a cash bond which had previously been forfeited by the trial court. All motions were denied by the trial court.

Defendant appealed arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." The Appellate Court refused to consider the question. State v. Williams, 106 Conn.App. 323 (2008).

Defendant sought certification from this Court to appeal which was denied. State v. Williams, 287 Conn. 908 (2008).

Specific Facts Relied Upon

On 23 May, Defendant filed a Motion for Reconsideration asking this Court to reconsider its denial of certification to appeal. On 4 June, the State filed an opposition to Defendant's Motion for Reconsideration.

The State's Opposition misstated the opinion below and contained an inaccurately credited quotation and erroneous or misleading citations. On pp. 5-6, the State wrote that:

> [The Appellate Court's] discussion of 54-142a(c) focused on the term "nolle" that renders the provisions of 142a(c) the functional equivalent of a dismissal: "Although they have some doctrinal and procedural differences ... in some legal respects they are treated as fungible," relying on this Court's rulings in State v. Gaston, 198 Conn. 435, 440 (1986) and State v. Gosselin, 133 Conn. 158, 160-61 (1946).

(Footnote omitted.)

The Appellate Court did not rely on Gaston and Gosselin. This is a misstatement. Rather, the quoted segment is itself a quote from Cislo v. Shelton, 240 Conn. 590, 608 (1997), and that is also the authority cited by the Appellate Court for the quoted principle. Cislo refers to Gaston and Gosselin only by way of example ("See, e.g.") and not as authority. Neither of these cases stands for the stated principle.

The State also miss-cites Gosselin. In fact, the case title is See v. Gosselin and not State v. Gosselin. This is not a criminal case and is certainly not a Sixth Amendment case.

And finally, in their footnote 2 on page 5, the State cites to State v. Winer, 286 Conn. 666, 267 (2008). In

fact, the State's citation is to the syllabus of that case and not to this Court's opinion.

Defendant's letter brings the State's misstatements to the Court's attention. The letter does not attempt to address the substance of Defendant's Motion for Reconsideration and is not a substantive response to the State's memoranda in opposition. See P.B. § 66-2(a).

Legal Grounds

Denial of permission to file the attached letter would "impede or defeat the ends of substantial justice."

Practice Book § 60-2 provides for the "supervision and control of proceedings on appeal". This Court has discretion in exercising those supervisory powers.

> Discretion imparts something more than leeway in decision making. It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.

State v. Martin, 201 Conn. 74, 88 (1986) (internal punctuation and citations omitted).

Apparently, the State's misdirection was intended to mislead this Court into believing that the Appellate Court was not relying on Cislo when, clearly, it was. This is the reason that the State claimed that the Appellate Court was instead relying on Gaston and Gosselin. Failure to grant this motion would leave the State's misstatements uncorrected and therefore

would "impede or defeat the ends of substantial justice." Martin, supra.

Denial of this motion would deny Defendant due process by denying him the opportunity to be heard on issues raised for the first time in the State's Opposition.

Defendant has a federal Fourteenth Amendment protected due process right to notice and a meaningful opportunity to be heard. In Re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948). Defendant did not have notice that the State would misstate the proceedings below in their opposition at the time that he filed his motion for reconsideration and nor is there any possible way that he could have anticipated their doing so. Therefore, it was impossible for Defendant to have addressed this issue in his motion. If this Court were now to refuse to file Defendant's letter, then Defendant will be denied any opportunity to be heard on this issue.

Practice Book § 66-3(a) denies defendants in criminal matters a fair procedure by denying them the right to response to arguments raised for the first time in the respondent's opposition.

The Due Process Clause of the Fourteenth Amendment requires that where a state provides a right of appeal in a criminal matter, the state must afford the defendant a fair procedure. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 55, 100 L.Ed. 891 (1956). Practice Book § 66-3(a), which denies the right of response to any arguments raised by the respondent, usually the State in criminal

matters, is out-of-step with the procedures of most appellate courts in the United States and a denial of a fair procedure.

Conclusion

For the foregoing reasons, this Court must grant this motion and order that Defendant's letter be filed.

Respectfully submitted,

Stephen J. Williams,
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
Tel. +1-860-450-1288

Attachment:

Michèle T. Angers, Esq.
Chief Clerk
Connecticut Supreme Court
231 Capitol Avenue
Hartford, Connecticut 06106

Dear Ms. Angers,

> *State v. Williams*, 106 Conn.App. 323, *cert. denied*, 287 Conn. 908 (2008).

Pursuant to this Court's inherent powers as codified in P.B. § 60-2, I write to bring to the Court's attention a misstatement of fact, an incorrectly

credited quotation and erroneous or misleading citations contained in the State's Opposition to Defendant's Motion for Reconsideration dated 4 June 2008. See *O'Brien v. Superior Court*, 105 Conn.App. 774, 786-90, *cert. denied*, 287 Conn. 901 (2008).

On pp. 5-6, the State writes that:

> [The Appellate Court's] discussion of 54-142a(c) focused on the term "nolle" that renders the provisions of 142a(c) the functional equivalent of a dismissal: "Although they have some doctrinal and procedural differences ... in some legal respects they are treated as fungible," relying on this Court's rulings in State v. Gaston, 198 Conn. 435, 440 (1986) and State v. Gosselin, 133 Conn. 158, 160-61 (1946).

(Footnote omitted.)

The Appellate Court did not rely on *Gaston* and *Gosselin*. This is a misstatement of fact. Rather, the quoted segment is itself a quote from *Cislo v. Shelton*, 240 Conn. 590, 608 (1997), and that is also the authority cited by the Appellate Court for the quoted principle. *Cislo* refers to *Gaston* and *Gosselin* only by way of example ("See, e.g.") and not as authority. Neither *Gaston* nor *Gosselin* stand for the stated principle. Ironically, the principle actually credited by *Cislo* to *Gaston*, and quoted by the Appellate Court, is "nolle and dismissal treated same for purposes of speedy trial analysis".

Apparently, the State's misdirection was intended to mislead this Court into believing that the Appellate

Court was not relying on *Cislo* when, clearly, it was. This is the reason that the State claimed that the Appellate Court was instead relying on *Gaston* and *Gosselin*. Obviously, the Appellate Court's reliance on, and citation to, *Cislo* undermines the State's argument that this Court's decision in *State v. Winer*, 286 Conn. 666 (2008), reconsidering the purpose of § 54-142a(c) as previously stated in *Cislo*, was irrelevant.

The State also miss-cites *Gosselin*. In fact, the case title is *See v. Gosselin* and not *State v. Gosselin*. This is not a criminal case and is certainly not a Sixth Amendment case.

And finally, in their footnote 2 on page 5, the State cites to *Winer*, 286 Conn. at 667. In fact, the State's citation is to the syllabus of that case and not to this Court's opinion.

This letter was served by post on Rita M. Shair, Esq., Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, Connecticut 06067.

Sincerely,

Stephen J. Williams

O. Petitioner's Motion to Disqualify Judicial Authority (13 June 2008)

Docket Nos. AC26901, MV04-392089 and MV05-394080	Connecticut Supreme Court

State of Connecticut
vs.
Stephen J. Williams | 13 June 2008

MOTION TO DISQUALIFY JUDICIAL AUTHORITY

Defendant/Petitioner suggests to justices of this Court that, pursuant to the Due Process Clause of the Fourteenth Amendment, it is necessary for them to recuse themselves. Should any justice fail to recuse him or herself, then Defendant moves the Court to determine whether disqualification is required. [1]

Brief History of the Case

Defendant sough the dismissal of two charges which had previously been nolled by the prosecution and the return of a cash bond which had previously been forfeited by the trial court. All motions were denied by the trial court.

Defendant appealed arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." The Appellate Court refused to consider the question.

---

[1] Defendant moves to disqualify pursuant to the federal Fourteenth Amendment due process standard and Defendant's fundamental right to a fair hearing. Nonetheless, the actual bias of a justice would almost always meet the appearance of bias standard. "Canon 3(c)(1)... and Practice Book § 1-22(a) require disqualification whenever a judge's impartiality might reasonably be questioned". State v. Canales, 281 Conn. 572, 593 (2007).

Rather, that court dismissed Defendant's appeal as regards the dismissal of the charges as moot and affirmed the trial court's refusal to return the bond after applying an abuse of discretion standard. State v. Williams, 106 Conn.App. 323 (2008).

Defendant sought certification from this Court to appeal which was denied. State v. Williams, 287 Conn. 908 (2008). Defendant filed a Motion for Reconsideration of that decision which is currently pending before the Court.

Specific Facts Relied Upon

The separation-of-powers controversy.

This Court, in State v. Clemente, 166 Conn. 501 (1974), announced what proved to be a controversial separation-of-powers ruling. Clemente was viewed by many as expanding the power of the judiciary. See, e.g., R. Kay, "The Rule-Making Authority and Separation of Powers in Connecticut," 8 Conn.L.Rev. 1 (1975). Nonetheless, conflict between the legislative branch and judiciary was avoided through a practice of enacting laws and court procedural rules which paralleled one another. Consequently, in 34 years, this Court has never reconsidered Clemente.

Attitudes changed in 2006 with this Court's opinion in Clerk v. Freedom of Information Com'n, 278 Conn. 28 (2006), followed shortly thereafter by ex-Chief Justice Sullivan's invocation of the separation-of-powers doctrine to avoid a legislative subpoena related to proceedings leading up to Sullivan v. McDonald, 281 Conn. 122 (2007). As a consequence,

during the 2007 legislative term, the legislature proposed a number of sweeping laws which were seen by many in the judiciary as impinging the judiciary's exclusive domain. See 2007 H.B. No. 7429. The proposed legislation did not pass during the 2007 session but was tabled again during the 2008 term. See 2008 S.B. No. 605. Matters came to a head following the 10 March 2008 Judiciary Committee meeting when it became apparent that the Judiciary would not support a previously agreed compromise. See testimony of Judge Patrick Carroll. As a consequence, "both Judiciary Committee chairmen predicted that a possible constitutional amendment that would explicitly establish legislative oversight of court rules would be 'on the table' in the next session." T. Scheffery, "Small Changes Kill Big Court Reform Bill", 6/2/2008 Conn.L.Trib. 1. Notably, there appears to be a new determination by the co-chair to put a constitutional amendment before Connecticut's voters. M. McGinley, "Is constitutional amendment only way state can ensure open government?" The Day, New London, 5/10/2008.

Defendant's Petition for Certification

Shortly following the Judiciary Committee hearing, Defendant filed his Petition for Certification in which he contended that "the real issue underlying this appeal is whether, post-Sullivan, our judiciary can be relied upon to police itself and therefore, whether the high degree of autonomy which our judiciary currently enjoys through the separation of powers doctrine is sustainable." Petition, p. 2. Specifically, Defendant argued that C.G.S. 54-142a violated the separation-of-powers doctrine by interfering in the exclusive domain of the State's Attorneys, by

interfering with the record keeping of the judiciary and by legislatively usurping the power of the judiciary to determine cases in controversy. Petition, pp. 6-7. Crucially, the judiciary has not enacted court rules paralleling § 54-142a. Had this Court granted certification, then it would likely have been required to consider the separation-of-powers issue and either invalidate § 54-142a as a violation of that doctrine or overrule Clemente.

Defendant's Petition could not have come at a more inopportune moment for proponents of judicial autonomy. Were this Court to reverse Clemente, then the Court would finally be accepting the rulemaking authority of the legislature. Were the Court to overturn § 54-142a, then, given the current political climate, the legislature would certainly propose a constitutional amendment limiting the judiciary's power and that amendment would almost certainly be adopted by the people. [2]

Legal Grounds

Where a justice is required to determine his own power, he necessarily has a personal interest in the outcome of the controversy.

"[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no ... interest in the outcome of [the] particular case." Bracy v. Gramley, 520 U.S. 899,

---

[2] Indeed, the situation is identical to that faced by the Court when State v. Moynahan, 164 Conn. 560, 568, *cert. denied*, 414 U.S. 976 (1973), resulted in Amendment Twenty-Three in 1984 and the limitation of judiciary's authority over the State's Attorneys.

904-5, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) (internal citations and quotation marks omitted). See also State v. Canales, 281 Conn. 572, 595 (2007).

> [T]he Supreme Court has consistently held that a judge's failure to recuse will implicate the due process clause only when the right to disqualification arises from actual bias on the part of the challenged judge, or where the probability of such actual bias is too high to be constitutionally tolerable.

R. Flamm, Judicial Disqualification, Second Edition, 2007 Supplement, §2.5.2, pp. 16-17 (footnotes citing as authority Canales at 593-4; Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); and Republican Party of Minnesota v. White, 536 U.S. 765, 775-6, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002)).[3]

Throughout time, power has had value. Wars have been fought to attain it and to retain it. For less violent examples and discussion of these principles, see State ex rel. Morris v. Bulkeley, 61 Conn. 287 (1892). Therefore, whenever a judge is asked to determine his own power, the judge necessarily has a personal interest in the outcome of the controversy.

---

[3] Judicial bias is considered a structural error. State v. Lopez, 271 Conn. 724, 733 (2004), citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "[Structural error] cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.... Such errors infect the entire trial process ... and necessarily render a trial fundamentally unfair." Id. See also Cameron v. Cameron, 187 Conn. 163, 168 (1982) ("an accusation of prejudice against a judge ... implicates basic concepts of fair trial").

This was confirmed recently by the New Jersey Supreme Court which, in considering disqualification in a similar separation-of-powers case, implicitly acknowledged their actual bias by relying on the Rule of Necessity to avoid the disqualification of the entire court. Williams v. State, 186 N.J. 368, 393, 895 A.2d 1128, 1143 (2006).[4]

Justices of this Court have demonstrated their actual bias through their attempts to retain power.

The justices of this Court have allowed themselves to become politicized. This is demonstrated by the recent public remarks of Justice Zarella:

> [A]s an attorney, who recognizes that the Code of Judicial Conduct requires that a judge abstain from public comment about a pending proceeding, you will do your part by publicly defending against unwarranted, unfair, or inappropriate criticism of the judiciary. Similarly legislative intrusions and other intrusions that threaten institutional independence should be opposed by attorneys when they deem that intrusion to be violative of the doctrine of separation of powers.

---

[4] See also K. Kiminsky, "Constitutional Law – Separation of Powers – The New Jersey Supreme Court Declares it can Decide Cases in Which it is Personally Interested, and a Statute Which Arms Probation Officers is an Unconstitutional Infringement of the Power of the Judicial Branch to Make Rules Governing the Administration of the Courts, Williams v. State, 895 A.2d 1128 (N.J. 2006)." 38 Rutgers L. J. 1359 (2007) and M. Haines, "The Ultimate Conflict of Interest", 7/22/2002 N.J.L.J. 23.

Prepared Remarks by Justice Peter T. Zarella, Bar Admission Ceremony, 16 May 2008 (speeches are available at http://www.jud.ct.gov/external/news/archive_speech.html). [5] This now appears to be a unified theme of the justices of this Court with almost identical public remarks being given by the Chief Justice just four days ago:

> When judges do the right thing under the law, however, we often make someone angry. And let me assure you, in the no-holds-barred era of the Internet soapbox, the feedback – often anonymous – can be brutal. As you know, we as judges cannot, under our Code of Judicial Ethics, comment about our cases. That is why it is so essential that the bar step up and speak up to make sure that the public understands the need for an independent judiciary that will apply the rule of law as opposed to making the popular or less controversial decision.

Remarks by Chief Justice Chase T. Rogers, CBA Bench/Bar Awards Luncheon, 9 June 2008. Justice Zarella had similarly spoken of his concern over coverage on the Internet and in particular, commentary by bloggers.[6]

---

[5] See also P.T. Zarella & T.A. Bishop, "Judicial Independence at a Crossroads," 77 Conn. B.J. 21, 40 (2003), which warns of the "potential risks to the cherished independence of the judiciary." Judge Bishop also authored the Appellate Court's opinion in this case.

[6] Although not a direct quote, the views expressed in these two speeches have many parallels to a memorandum from

While it is true that the judiciary has often attempted to directly influence the legislature through the emissaries which Justices Rogers and Zarella refer to in their remarks, these latest public comments represent a new initiative to directly influence the people who elect our legislatures. This is, no doubt, a consequence of the recent comments by the co-chair of the Judiciary Committee that they intend to move forward with a constitutional amendment and resulting perceptions by the justices that they have lost the battle to directly influence the legislature. Unfortunately, by entering the political fray, the justices of this Court have abandoned their roll as judges.

By politicizing the separation-of-powers issue, members of this Court have violated numerous Canons of the Code of Judicial Conduct.

As a general principle, Canon 3 requires that "[t]he judicial duties of a judge take precedence over all the judge's other activities." Specifically, Canon 3(a)(6) requires that:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar

---

the National Center for State Courts and in particular, the quotes are very similar to the second paragraph of that memorandum. In addition to recommending enlistment of the bar, the memorandum discusses the organization of judges into "response teams", "fire brigades" and "strike forces". http://www.ncsconline.org/WC/Publications/KIS_JudInd_S97-0693_Pub.pdf (visited 12 June 2008). Among other activities, the NSCS engages in political lobbying before Congress.

> abstention on the part of court personnel subject to the judge's direction and control.

There is little difference between direct partisan comment on an issue and extolling others to make partisan comments on your behalf – both of which justices of this Court have now done. Indeed, one of the likely reasons for attempting to engage in the debate indirectly through emissaries is to hide the true source of the message so as to impede those who might claim bias or violation of the Code of Judicial Conduct.

Nor, given recent events and the legislatures determination to enact legislation, can there be any doubt that this issue will soon be before the Court. Indeed, members of the judiciary, and their emissaries, have repeatedly warned that the proposed legislation is likely to be struck by this Court as unconstitutional. See, for example, the comments of External Affairs Director Melissa Farley as reported in 6/2/2008 Conn.L.Trib. 1. Needless to say, by engaging in the public forum to advance their own political interests, and extolling others to do likewise, justices of this Court have also violated Canon 3(a)(1) which requires that they be "be unswayed by partisan interests".[7]

---

[7] See also the 2007 ABA Code of Judicial Conduct, Rule 2.11(A)(5) ("A judge shall disqualify himself or herself in any proceeding in which... [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.")

Most critically, by publicly taking on a partisan roll on this issue, the justices have violated Canon 4 which requires that they "not cast doubt on the judge's capacity to decide impartially any issue that may come before him or her". [8] Obviously, the activities of the justices raises serious doubts as to their ability to now decide impartially.[9]

Finally, the justices' appeal to members of the bar to come to their aid is far more egregious than their speaking directly on the issue. In the case of Justice Zarella, he was speaking directly to newly admitted attorneys who, arguably, would be most impressionable. Justice Zarella was very clear that "[a]s officers of our legal system, you especially are

---

[8] Lack of judicial restraint is a common theme in this state when it comes to the separation-of-powers issue. Even though the judiciary was not a party in the proceedings in Sullivan v. McDonald, 41 Conn. L. Rptr. 618 (Conn.Super. 30 June 2006), *order stayed*, 281 Conn. 122 (2007), they still intervened and present arguments. Intervention unnecessarily placed the justices in a position where they would ultimately be called upon to decide their own case. All justices in this Court subsequently recused themselves.

[9] It is normal practice not to comment on matters which might eventually come before a court and, especially, on the constitutionality of pending legislation. See, e.g., Chief Justice Rehnquist's refusal to comment on the constitutionality of bills pending before Congress at his initial confirmation hearing. Hearing before the Committee on the Judiciary, United States Senate, 99th Congress, 2nd Sess., 231, 188, 320, 399 (1986). Yet the judiciary, either directly or through emissaries, has repeatedly warned of the unconstitutionality of the proposed legislation. See also Chief Justice John Jay's 1793 letter refusing to provide President George Washington with an advisory opinion citing the separation of powers doctrine and Article 3 jurisdictional requirement of a actually case-in-controversy.

responsible for defending the judiciary from unwarranted intrusions on its independence." The members of our bar are directly regulated by the judiciary and success in their chosen profession depends on their being able to persuade that judiciary. Under these circumstances, what lawyer would now be foolish enough to defy their supposed responsibility' to their "first client – the judiciary"? This is an abuse of the power of the office of justice.

The justices of this Court have demonstrated their bias by taking concrete actions in this specific case in furtherance of their personal interests.

As described in Defendant's Motion for Reconsideration, this Court refused to certify Defendant's appeal despite being made aware that the point of law relied upon by the Appellate Court had subsequently been invalidated by this Court. See Motion, p. 2. This Court's denial of certification under those circumstances was a clear abuse of discretion. See Motion, pp. 3-5.

The only explanation for this Court's action is that the justices of the Court wished to avoid considering a case which raised the separation-of-powers issue as doing so would likely undermine their power. The justices of this Court therefore decided Defendant's Petition based upon their own personal interests rather than based upon their obligations as justices of this Court.

The parallels to the Sullivan affair are striking. Justice Sullivan abused his discretion by holding up the publication of the Clerk opinion so as assist his friend and colleague, Justice Zarella, in becoming

Chief Justice. Judicial Review Council, Memorandum of Decision: In re Sullivan, 68 Conn.L.J. 24 at 5D (Dec. 12, 2006). In doing so, he was involving himself in the political process by attempting to prevent the Judiciary Committee from raising questions related to Clerk. Id. Justice Sullivan was ultimately suspended for 15 days as punishment. Id. at 8D.

In the present case, the justices of this Court have abused their discretion by denying Defendant's Petition where circumstances required that they grant certification. The justices' reason for doing so was similarly to achieve a political purpose although in the present case, the goal was the retention of their own personal power rather than to assist a friend and colleague in attaining new powers.

The one significant difference, however, is that Justice Sullivan did not intend to subvert the proceedings in this Court to further his political goal whereas in the present case, by denying a Petition which should have been granted, the justices of this Court have substantively affected proceedings in this Court to further their political agenda.

Defendant had a right to expect justice in this Court and the people of this state have a right to expect this Court to decide difficult and important issues whenever it is required to do so.

The Rule of Necessity is inapplicable to this case.

The Rule of Necessity provides that

> actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.

U. S. v. Will, 449 U.S. 200, 214, 101 S.Ct. 471, 480, 66 L.Ed.2d 392 (1980). See also Dacey v. Connecticut Bar Assn., 170 Conn. 520, 520-21 (1976).

The Rule of Necessity is not applicable for two of reasons. Firstly, the purpose of the Rule of Necessity is to facilitate a court hearing and determining a matter where recusal or disqualification would make that impossible. But in the present case, this Court refused to exercise its jurisdiction and determine the matter. The Rule of Necessity was never intended to facilitate a court's refusal to exercise its jurisdiction. At this stage in the proceeding, disqualification of justices of this Court and subsequent action by unbiased judges is the only remaining method whereby this Court's jurisdiction can be protected.

Secondly, there is no necessity. This is not a situation where recusal or disqualification would defeat the jurisdiction of the Court. Unlike in Williams v. State, Defendant is only seeking the disqualification of justices of this Court. As recently demonstrated in Sullivan v. McDonald, 281 Conn. 122 (2007), even the disqualification of all justices of this Court will not defeat the jurisdiction of the Court. In Williams v. State, the Rule of Necessity applied because a Defendant in that case sought the disqualification of the entire judiciary arguing that the matter should instead be transferred to a neutral

third party. Williams v. State, 186 N.J. at 393, 895 A.2d at 1143. Defendant is not arguing that the judiciary is unable to determine this matter.

Nor is it apparent that the entire judiciary would be disqualified from hearing this matter. Indeed, this should not be the case. Despite the intensity with which this issue has been pressed by the upper echelon of our judiciary, not all Connecticut judges share their views. See, for example, Superior Court Judge Radcliffe's testimony before the Judiciary Committee on 9 April 2007. More importantly, there are numerous Connecticut judges who have not attempted to politicize the separation-of-powers issue, not allowed themselves to become partisan, not violated numerous Canons of Judicial Conduct, not tried to enlist members of the bar in their battle and not decided Defendant's Petition for Certification based upon their own personal interests. Dacey v. Connecticut Bar Ass'n., 184 Conn. 21, 23-24 (1981), is clear that the Rule of Necessity is inapplicable where a full court of non-disqualified jurists can still be assembled.

Conclusion

For the foregoing reasons, Defendant asks the justices of this Court to consider their recusal and should they not recuse themselves, that they be disqualified by the Court.[10]

---

[10] Practice Book § 1-23 requires that evidence supporting a motion to disqualify be set forth by affidavit. Obviously, § 1-23 anticipates a motion to recuse pursuant to Canon 3(c) where a party would normally be expected to have personal knowledge of the relevant facts. However, this motion to disqualify is unusual in that the basis for disqualification is

Respectfully submitted,

Stephen J. Williams,
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
Tel. +1-860-450-1288

P. Petitioner's Motion for Articulation (22 July 2008)

Docket Nos. AC26901, MV04-392089 & MV05-394080	Connecticut Supreme Court
State of Connecticut vs. Stephen J. Williams	22 July 2008

MOTION FOR ARTICULATION

Pursuant to P.B. § 60-3, Defendant/Petitioner moves this Court for an articulation of its order dated 17 July 2008 dismissing Defendant's Motion to Disqualify Judicial Authority.

---

not personal to Defendant. As a result, all evidence supporting this motion is already in the public domain or a matter of record in this Court. Defendant has no personal knowledge of the events and therefore there is nothing of relevance for him to include by way of affidavit.

Brief History of the Case

Defendant sough the dismissal of two charges which had previously been nolled by the prosecution and the return of a cash bond which had previously been forfeited by the trial court. All motions were denied by the trial court.

Defendant appealed arguing that "a pervasive pattern of judicial misconduct had denied him the opportunity of a fair and impartial hearing." The Appellate Court refused to consider the question. State v. Williams, 106 Conn.App. 323 (2008).

Defendant sought certification from this Court to appeal which was denied. State v. Williams, 287 Conn. 908 (2008).

Specific Facts Relied Upon

On 23 May 2008, Defendant filed a Motion for Reconsideration asking this Court to reconsider its denial of certification to appeal.

The State filed an opposition which misstated the opinion below and contained an inaccurately credited quotation and erroneous or misleading citations. Consequently, on 13 June 2008, Defendant filed a motion seeking to bring this to the attention of the Court.

Also on 13 June 2008, Defendant filed a Motion to Disqualify Judicial Authority arguing that the participation of the justices of this Court in this matter violated Defendant's Fourteenth Amendment

protected right to due process because the justices had an actual bias.

On 1 July 2008, while Defendant's Motion to Disqualify was pending, the Court denied Defendant's 23 May Motion for Reconsideration and 13 June motion seeking to bring to the attention of the Court the State's misstatement of the proceedings, incorrectly credited quotation and erroneous citations.

Finally, on 17 July 2008, the Court dismissed Defendant's Motion to Disqualify.

Legal Grounds

This Court's order dismissing Defendant's Motion to Disqualify Judicial Authority fails to state the basis for the dismissal of that motion.

Defendant needs to know the basis for the dismissal so that he can, for example, correct any noncomplying papers and resubmit the motion for substantive consideration by the Court. See. P.B. § 62-7.

Practice Book § 71-5 requires that a motion for reconsideration "state briefly the grounds for requesting reconsideration." Therefore, without knowing the basis for dismissal, Defendant is also effectively precluded from seeking reconsideration of that order.

Defendant also needs to know the basis for the dismissal so that he can consider whether it would be appropriate to pursue a petition for certiorari to the

United States Supreme Court. Failure to provide a statement of reasons in the order dismissing Defendant's motion has worked a denial of Defendant's federal Fourteenth Amendment due process right to notice. In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948).

But most critically, Defendant's Motion to Disqualify argues that the justices of this Court have an actual bias which precludes them from acting in this matter. Defendant's motion catalogues numerous violations of the Code of Judicial Conduct by justices on this Court. Motion, pp. 6-8. Defendant's motion also describes the concrete actions taken by the justices of this Court in this specific case to further their personal interests. Motion, pp. 8-9. Dismissing Defendant's motion without explanation carries with it the perception that this Court is attempting to avoid determining a motion which itself could be harmful to the justices' personal interests and political power base. This perception is exasperated by the clear violation by the justices of this Court of the legal principle that "when a judge is confronted with a motion seeking his disqualification, he should resolve that motion immediately, before making any other rulings in the case". R. Flamm, Judicial Disqualification, Second Edition, § 17.1, p. 486. Therefore, failure to state any reasons for the dismissal damages the creditability of this court and carries with it a grave risk of jeopardizing our judicial system as a whole.

Conclusion

For the foregoing reasons, this Court must articulate its reasons for dismissing Defendant's Motion to Disqualify Judicial Authority.

Respectfully submitted,

Stephen J. Williams,
Petitioner
12 September Road
Storrs
Connecticut 06268-2806
USA
Tel. +1-860-450-1288